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IN THE

Supreme Court of the United States

October Term, 1973

No. 73-620

GOVERNING BOARD OF THE TORRANCE UNIFIED SCHOOL DISTRICT,
Petitioner,

vs.

STANLEY M. LINDROS,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

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GOVERNING BOARD OF THE TORRANCE UNIFIED SCHOOL DISTRICT,
Petitioner,

vs.

STANLEY M. LINDROS,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

Petitioner Governing Board of the Torrance Unified School District respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of California entered in this proceeding on May 31, 1973.

OPINIONS BELOW

The majority and dissenting opinions of the California Supreme Court, copies of which are set forth as Appendix B to this Petition, are reported as *Stanley*

M. Lindros v. Governing Board of the Torrance Unified School District, 9 Cal.3d 524 [108 Cal. Rptr. 185, 510 P.2d 361] (1973).

The opinion of the California Court of Appeal, Second District, vacated upon the granting of a hearing by the California Supreme Court, a copy of which is set forth as Appendix C to this Petition, is reported as *Stanley M. Lindros v. Governing Board of the Torrance Unified School District,* 103 Cal.Rptr. 188. (1972).

JURISDICTION

The judgment of the California Supreme Court which is sought to be reviewed was entered on May 31, 1973. On June 15, 1973, Petitioner Governing Board (Respondent below) filed its timely Petition for Rehearing in the California Supreme Court, a copy of which is set forth as Appendix A to this Petition. On July 12, 1973, the California Supreme Court denied the Petition for Rehearing. (See Appendix D). The present Petition for a Writ of Certiorari is filed within the required ninety-day period following entry of final judgment.

Petitioner invokes the jurisdiction of this Court under Title 28, United States Code, Section 1257(3), since a State statute is drawn in question on the ground of its being repugnant to the Constitution of the United States, and since a right, privilege and immunity is specially set up and claimed under the Constitution of the United States.

QUESTIONS PRESENTED

1. Whether, and under what circumstances, a public school teacher is granted a right by the First and Fourteenth Amendments to, or other provisions of, the United States Constitution, to read a short story containing offensive, indecent and vulgar language to co-educational tenth grade high school classes for alleged instructional purposes.

2. Whether the California Supreme Court incorrectly held that a probationary public high school teacher could not be dismissed for reading to his classes a short story containing offensive language, including the words "White-mother-fuckin Pig", where it appears that the judgment of that Court was based upon its construction of a State statute made under compulsion of its interpretation of the United States Constitution.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Amendment I:

> "Congress shall make no law respecting an establishment of religion, or prohibition the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

United States Constitution, Amendment XIV, Section 1:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

California Education Code, Section 13443(d):

> "The governing board's determination not to reemploy a probationary employee for the ensuing school year shall be for cause only. The determination of the governing board as to the sufficiency of the cause pursuant to this section shall be conclusive, but the cause shall relate solely to the welfare of the schools and the pupils thereof and provided that cause shall include termination of services for the reasons specified in Section 13447. The decision made after the hearing shall be effective on May 15 of the year the proceeding is commenced."[1]

STATEMENT OF THE CASE

Respondent Stanley M. Lindros was a probationary teacher employed by the Governing Board of the Tor-

[1]West's Annotated California Codes, Education; Added by California Statutes, 1965, C.1110,p.2755,sec.2 as Education Code §13443(e); renumbered as sec. 13443(d), by Cal.Stats.,1969, c.1315,p.2651,sec.1; amended by Cal.Stats., 1970, c.273,p.543,sec.1; Cal.Stats.,1970, c.1565,p.3203,sec.2; Cal.Stats.,1971, c.655,p.1301,sec.1; Cal.Stats.,1971,c.659,p.1310,sec.2.

rance Unified School District, a local public school district. After a hearing conducted pursuant to California statute, Petitioner Governing Board determined that sufficient cause existed not to reemploy Respondent Lindros and determined not to reemploy him. A California statute provided then, as today: "The governing board's determination not to reemploy a probationary employee for the ensuing school year shall be for cause only. The determination of the governing board as to the sufficiency of the cause . . . shall be conclusive, but the cause shall relate solely to the welfare of the schools and the pupils thereof . . ."

The incident constituting the main charge against Respondent Lindros was his reading to his coeducational tenth grade English classes of a short story of his own composition entitled "The Funeral". As described by the California Supreme Court, ". . . the story recorded petitioner's emotions at the funeral of one of his students who, during the time Lindros taught at a predominantly black high school in Watts, died of a heroin overdose."[2]

The story, printed in Appendix B, infra, pp. 9-11, and at 9 Cal.3d 528-529, 108 Cal.Rptr. 186-187, 510 P.2d 362-363, contains highly offensive language, concluding with the words "White-mother-fuckin-Pig", which words were read aloud in full to at least some of Lindros' classes.[3]

---

[2]Appendix B, *infra*, p. 8; *Lindros v. Governing Board*, supra, 9 Cal. 3d 524, 527 [108 Cal.Rptr. 185, 186, 510 P.2d 361, 362.]

[3]Appendix B, *infra*, pp. 11-12; *Lindros v. Governing Board, supra*, 9 Cal.3d 524, 529-530 [108 Cal. Rptr. 185, 187-188, 510 P.2d 361, 363-364.]

Following the decision of Petitioner Governing Board not to reemploy Lindros, Lindros petitioned the Los Angeles Superior Court, a court of general jurisdiction, for a writ of mandate to compel the Governing Board to set aside its decision. The Superior Court denied the petition.

Lindros appealed to the California Court of Appeal, an intermediate appellate court, which affirmed the judgment of the Superior Court denying relief to Lindros. (Appendix C)

The California Supreme Court thereafter granted a hearing and the judgment of the Court of Appeal was vacated. The California Supreme Court, with two Justices disstnting, reversed the judgment of the Superior Court and held that Lindros should not be dismissed from employment.

Petitioner Governing Board petitioned the California Supreme Court for a rehearing, which was denied on July 12, 1973. Three justices were of the opinion that the petition for rehearing should have been granted.

The federal questions sought to be reviewed were timely raised at all stages of the proceedings. In paragraph 10(c) of his petition for writ of mandate in the Superior Court, Lindros alleged:

> "Respondent [the School Board] committed a prejudicial abuse of discretion with respect to its determination that Paragraph VII A of the Proposed Decision [concerning reading of the short

story] constituted sufficient cause not to reemploy petitioner [Lindros] . . .

"(i) . . . Petitioner's [Lindros'] rights under the First and Fourteenth Amendments of the U.S. Constitution are violated if repsondent [school board] can not reemploy him for reading literature in class when no standards or understanding as to what reading materials were impermissible were in existence or articulated to the teachers.

"(ii) In the alternative, even if there were an understanding . . . such understanding was too vague and over board, and it was never articulated to petitioner [Lindros] or other teachers at South High School, and therefore it would violate petitioner's rights under the First and Fourteenth Amendments of the U.S. Constitution not to reemploy him for the incidents related in Paragraph VII A of the Proposed Decision. [The reading of the short story.]."

The Superior Court impliedly rejected the First and Fourteenth Amendment claims in its Findings of Fact and Conclusions of Law. Finding of Fact No. XII reads in part:

". . . The use of the coarse and vulgar expression by the Petitioner was the exercise of extreme bad judgment."

Conclusion of Law No. 5 reads: "Petitioner's [Lindros'] dismissal was proper."

In his Appellant's Opening Brief filed in the California Court of Appeal, Lindros urged as Point IV:

"The Reading of 'The Funeral' . . . cannot constitute sufficient cause related to the welfare of the schools and the pupils not to rehire appellant [Lindros] in that Appellant [Lindros] was not given adequate notice that the reading could subject him to disciplinary action and that to subject him to disciplinary action would violate his right to academic freedom."

The dicussion of this point occupied some thirty pages of the brief. Major reliance in Lindros' Opening Brief was placed upon *Keefe v. Geanakos,* 418 F.2d 359 (1st Cir.1969), *Parducci v. Rutland,* 316 F. Supp. 352 (M.D. Ala.N.D. 1970), and *Mailloux v. Kiley,* 323 F. Supp. 1387 (D.Mass 1971). Apart from a citation of California Education Code Section 13443, only federal cases construing the United States Constitution were discussed - not one California case was cited in support of Point IV.

Likewise, in the Appellant's Reply Brief filed in the California Court of Appeal by Lindros, the outline of the argument reads in part:

"II. The reading of 'The Funeral' cannot constitute sufficient cause related to the welfare of the schools and the pupils not to rehire appellant in that appellant was not given adequate notice that the reading could subject him to disciplinary action and that to subject him to disciplinary action would violate his academic freedom.

A. Appellant was not given adequate notice.

B. The reading of the 'The Funeral' was not

> **sufficient cause related to the welfare of the schools and the pupils thereof to warrant Respondent's [School Board's] action.**
>
> **(1) No obscenity was involved.**
>
> **(2) Appellant's use of 'The Funeral' was protected by the First and Fourteenth Amendments to the United States Constitution and by Article I, Section 8 of the California Constitution.**
>
> **(3) The particular facts of the case do not permit a blancing of interests against academic freedom."**

With the exception of the reference to Article I, Section 8, of the California Constitution and the discussion of an unpublished opinion of the California Court of Appeal relied upon by the Governing Board in its brief, the discussion in the reply brief on this point was almost exclusively of federal cases construing the United States Constitution.

The Court of Appeal, in an opinion later vacated by the California Supreme Court, stated:

> "The basic contention presented by the plaintiff [Lindros] is that the refusal to rehire him because of his reading of 'The Funeral' to his tenth grade English classes constituted a violation of academic freedom protected by the First Amendment of the United States Constitution."[4]

[4] *Lindros v. Governing Board,* Appendix C, p. 49; 103 Cal.Rptr. 188, 193 (1972).

In its opinion, the Court of Appeal fully passed upon and rejected that contention.

In his petition for hearing addressed to the California Supreme Court following the decision of the Court of Appeal, Lindros presented the following two points, among others:

> "1. Whether the respondent school board was legally correct in not rehiring appellant [Lindros], a probationary teacher, on the grounds that appellant read a story to his high school class which contained certian allegedly offensive words, where respondent promulgated no oral or written rules proscribing such conduct and where the evidence showed that respondent had or would have accepted and condoned conduct of a similar nature.
>
> "2. Whether appellant's reading of a certain story to his high school class was protected as a matter of academic freedom where there was no showing of any harm to the pupils who heard such story and no showing of any disruption of school activities and where respondent [the School Board] had set forth no evidence or argument for proscribing such conduct."

In Lindros' Memorandum of Points and Authorities attached to the Petition for Hearing filed in the California Supreme Court, Lindros cited in support of the foregoing two points only the following cases, all of them federal cases based on the United States Constitution.

Keefe vs. Geanakos, 418 F.2d 359 (1 Cir.);
Parducci vs. Rutland, 316 F.Supp. 352;
Sweezy vs. New Hampshire, 354 U.S. 234;
Wieman vs. Updegraff, 344 U.S. 183;
Keyishian vs. Board of Regents, 385 U.S. 589;
Adler vs. Board of Education, 342 U.S. 485;
Shelton vs. Tucker, 364 U.S. 479.

Major reliance was placed upon *Keefe vs. Geanakos*, 418 F.2d 359, and *Parducci vs. Rutland*, 316 F.Supp. 352.

In its opinion, the California Spreme Court held that California Education Code Section 13443(d), properly construed, did not permit the dismissal of Lindros:

> "In this case we examine Education Code section 13443 . . ."[5]

> ". . . we hold that these incidents fail to establish 'cause' for termination which is reasonably 'related[d] to the welfare of the schools and pupils thereof' as required by section 13443, subdivision (d) . . ."[6]

Petitioner Governing Board urges that the California Supreme Court construed California Education Code Section 13443(d) under compulsion of its construction of the United States Constitution, as illustrated in part by the following quotations from its opinion:

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[5]Appendix B, *infra*, p. 6; *Lindros v. Governing Board*, *supra*, 9 Cal.3d 524, 526 [108 Cal.Rptr. 185; 510 P.2d 361].

[6]Appendix B, *infra*, p. 7; *Lindros v. Governing Board*, *supra*, 9 Cal.3d 524, 527 [108 Cal.Rptr. 185, 186, 510 P.2d 361, 362].

"Finally, the United States Supreme Court has recognized the widespread use of current, divergent and distasteful patterns of speech, such as those involved here; indeed, in some situations that court has accorded constitutional protection to similarly shocking and offensive language."[7]

"Three recent cases in which the [United States] Supreme Court vacated criminal convictions for offensive speech and remanded in light of *Cohen v. California, supra,* 403 U.S. 15, illustrate the same point . . . These cases illustrate both the use of such speech in sections of our multifarious society and an increasing immunity from criminal sanction for such expressions." ("United States" added).[8]

". . . Several federal cases illustrate the serious constitutional questions which arise when school authorities seek to curb the academic freedom of teachers to employ techniques supported by substantial opinion in the teaching profession. (*Keefe v. Geanakos* (1st Cir. 1969) 418 F.2d 359; *Parducci v. Rutland* (M.D. Ala. 1970) 316 F.Supp. 352.)"[9]

". . . Several federal cases, moreover, have accepted the notice argument in the context of constitutional due process and academic freedom challenges to teacher dismissals. (See *Mailloux v. Kiley* (D. Mass. 1971) 323 F.Supp. 1387, affd. 448 F.2d 1242; *Keefe v. Geanakos* (1st Cir. 1969) 418 F.2d 359, 362; *Webb v. Lake Mills Community*

[7]Appendix B, *infra,* p. 23; *Lindros V. Governing Board, supra,* 9 Cal.3d 524, 536 [108 Cal.Rptr. 185, 192; 510 P.2d 361, 368].

[8]Appendix B, *infra,* pp. 24-25; *Lindros v. Governing Board, supra,* 9 Cal.3d 524, 536-7 [108 Cal.Rptr. 185, 193; 510 P.2d 361, 369].

[9]Appendix B, *infra,* p. 25 fn. 8; *Lindros v. Governing Board, supra,* 9 Cal. 3d 524, 537, fn.8 [108 Cal.Rptr. 185, 193 fn.8; 510 P.2d 361, 369 fn.8].

School District (N.D. Iowa 1972) 344 F.Supp. 791 800-801, 804-805; *Parducci v. Rutland* (M.D. Ala. 1970) 316 F.Supp. 352, 357; cf. *President's Council, Dist. 25 v. Community Sch. Bd. No. 25* (2d Cir. 1972) 457 F.2d 289, 293-294.)'"[10]

"... We heed Judge Wyzanski's characterization of fundamental public policy: that education must 'foster open minds, creative imaginations and adventurous spirits. Our national belief is that the heterodox as well as the orthodox are a source of individual and of social growth....' (*Mailloux v. Kiley* (D.Mass. 1971) 323 F.Supp. 1387, 1391.)'"[11]

Further, in its "Respondent's Petition for Rehearing" addressed to the California Supreme Court, Petitioner Governing Board invited that Court to declare whether it relied solely upon state law:

"The opinion of the court should be modified to reflect whether or not the court relied solely on statutory grounds in order that the Legislature may be so guided in considering whether to amend Education Code Section 13443."

The Court declined to modify its opinion.

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[10]Appendix B, *infra*, p. 27; fn.10; *Lindros v. Governing Board, supra*, 9 Cal.3d 524, 538 fn.10 [108 Cal.Rptr. 185, 194 fn.10; 510 P.2d 361, 370 fn.10].

[11]Appendix B, *infra*, p. 31; *Lindros v. Governing Board, supra*, 9 Cal.3d 524, 541 [108 Cal.Rptr. 185, 196; 510 P.2d 361, 372].

REASONS WHY A WRIT OF CERTIORARI SHOULD BE GRANTED

Acting under compulsion of its interpretation of the United States Constitution, the California Supreme Court has determined that a public school teacher may not be dismissed from his employment by a local school board for reading to his classes a story containing highly offensive language, even where the trial court found that "[T]he use of the coarse and vulgar expression by [Lindros] was the exercise of extreme bad judgment."

This Court has never determined the question of the extent to which, and the circumstances under which, a First Amendment right of "academic freedom" or "freedom of speech" is applicable to the classroom presentations of secondary school teachers. Likewise, this Court has not determined the circumstances, if any, under which a secondary school teacher may not, consistently with the United States Constitution, be disciplined or dismissed without a prior "notice" or "warning", and if he may not, the nature of the "notice" or "warning" which is required.

Conversely, at issue in this case is the extent to which, if any, the States and localities are prohibited by the United States Constitution from regulating what they consider to be unwholesome influences and language in secondary school classrooms. This issue has also not been determined by this Court.

The California Supreme Court, in determining that Lindros could not be dismissed, relied upon decisions of this Court and other federal courts.

This Court has recently defined the authority of the States with respect to the control of obscenity in criminal cases. A decision of this Court concerning the authority of States and localities to enforce a wholesome atmosphere and decency in public school classrooms would be highly timely and appropriate.

If this Court is unable to ascertain with requisite certainty whether the California Supreme Court acted under what it conceived to be the compulsion of the Federal Constitution, the judgment of that Court may be vacated and the cause remanded for further proceedings to that Court. (*Department of Motor Vehicles v. Rios,* ..... U.S....., 93 S.Ct ....., 35 L.Ed.2d 398 (1973); *California v. Krivda,* ..... U.S. ....., 93 S.Ct. 32, 34 L.Ed.2d 45 (1972); *Mental Hygiene Dept. v. Kirchner,* 380 U.S. 194, 85 S.Ct. 871, 13 L.Ed.2d 753.

CONCLUSIONS

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of the State of California.

Respectfully submitted,

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APPENDIX "A"

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

STANLEY M. LINDROS, Plaintiff and Appellant.	)	L.A. NO. 30059
vs.	)	
GOVERNING BOARD OF THE TORRANCE UNIFIED SCHOOL DISTRICT, Defendant and Respondent.	)	(S.C. No. 980,112)

RESPONDENT'S PETITION FOR REHEARING

TO THE HONORABLE DONALD R. WRIGHT, CHIEF JUSTICE, AND TO THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

Defendant and Respondent Governing Board of the Torrance Unified School District respectfully petitions for a rehearing to reconsider the decision and opinion of the Supreme Court in the above captioned cause, filed in this action on May 31, 1973, on the following grounds:

1. If good faith, bona fide educational purpose, and the like are deemed legally dispositive factors,

the cause should be remanded to Respondent Board for further findings on those factual issues.

2. The opinion of the Court should be modified to reflect whether or not the Court relied solely on statutory grounds in order that the Legislature may be so guided in considering whether to amend Education Code Section 13343.

WHEREFORE, Respondent Governing Board of the Torrance Unified School District respectfully requests that this Court grant this Petition for Rehearing.

Dated: June 15, 1973.

Respectfully submitted,

JOHN H. LARSON, County Counsel

KENNETH E. REYNOLDS, Deputy County Counsel

By: KENNETH E. REYNOLDS
Deputy County Counsel
Attorneys for Defendant and Respondent

MEMORANDUM OF POINTS AND AUTHORITIES

I

IF GOOD FAITH, BONA FIDE EDUCATIONAL PURPOSE, AND THE LIKE ARE DEEMED LEGALLY DISPOSITIVE FACTORS, THE CAUSE SHOULD BE REMANDED TO RESPONDENT BOARD FOR FURTHER FACTUAL FINDINGS ON THOSE ISSUES.

The majority opinion relies heavily on the good faith and bona fide educational purpose of the teacher in determining that the reading of "The Funeral" did not constitute "cause" for dismissal under Section 13443 of the Education Code. Yet, the Proposed Decision of the Hearing Officer and the Decision of the Board are, at best, ambiguous on those issues: There is no clear finding that the teacher acted in good faith or with a bona fide educational purpose.

The Board should have the opportunity to make its findings on such evidence as the admitted fact that the teacher lied to the principal about his actions [Respondent's Brief, pp. 21-22], and on the further evidence that the teacher had referred to the conduct of a colleague as "chicken shit" [C.T. 18]. Although not found by the Board to be causes for dismissal in themselves, these incidents do nevertheless tend to tarnish the halo placed upon Mr. Lindros by the majority opinion and do bear upon the issue of the teacher's good faith and reasonableness.

In *Board of Trustees v Metzger,* 8 Cal.3d 206, and *Bekiaris v. Board of Education,* 6 Cal.3d 575, this Court displayed considerable deference to the findings of fact of the appropriate fact-finding body, whether the Superior Court or the local school board. It is only proper that the local school board in this case should have the opportunity to make initial findings of fact on such issues as that of good faith, if such issues are deemed dispositive.

II

THE OPINION OF THE COURT SHOULD BE MODIFIED TO REFLECT WHETHER OR NOT THE COURT RELIED SOLELY ON STATUTORY GROUNDS IN ORDER THAT THE LEGISLATURE MAY BE SO GUIDED IN CONSIDERING WHETHER TO AMEND EDUCATION CODE SECTION 13443.

The primary thrust of the Brief and Petition for Hearing filed on behalf of the teacher is that the Board's action was prohibited by United States Constitutional Law. This Court's opinion is not clear beyond doubt that the Court's decision is based on a construction of Education Code Section 13443. For example, the Court cites Judge Wyzanski's characterization of fundamental public policy in relation to academic freedom [Slip Opinion, pp. 32-33].

The subject of teacher dismissals has recently been the subject of attention by the California Legislature.

(See, for example, Education Code Sections 13403, et seq., as amended by Stats., 1971, c. 361, which revise the procedures for dismissal of permanent teachers.)

It is proper, therefore, that the Court's opinion should reflect whether the decision is based solely upon the construction of state statutory law.

CONCLUSION

For the above reasons, Respondent Governing Board requests that a rehearing be granted.

Respectfully submitted,

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APPENDIX "B"

OPINION OF THE SUPREME COURT OF CALIFORNIA

[L.A. No. 30059. In Bank, May 31, 1973.]

STANLEY M. LINDROS, Plantiff and Appellant, v. GOVERNING BOARD OF THE TORRANCE UNIFIED SCHOOL DISTRICT, Defendant and Respondent.

COUNSEL

Arthur Grebow and Stephen E. Kalish for Plaintiff and Appellant.

John D. Maharg, County Counsel, Kenneth E. Reynolds, John J. Wagner and Howard R. Gilstrap, Deputy Counsel, for Defendant and Respondent.

OPINION

TOBRINER, J.—In this case we examine Education Code Section 13443,[1] which establishes the conditions

[1]Except as otherwise noted, all statutory references hereinafter are to the Education Code.

Section 13443 provides probationary teachers with a panoply of procedural and substantive rights. The statute requires school administrators to give notice by March 15, with a statement of reasons, of an intent to recommend against reemployment for the following academic year. It also provides for a hearing upon request before a hearing officer appointed under Government Code section 11500 et seq., for discovery, and for a final decision by the governing board by May 15. The substantive protection afforded by the statute appears in subdivision (d) which declares in relevant part that "*The governing board's determination not to reemplay a probationary employee for the ensuing school year shall be for cause only. The determination of the governing board as to the sufficinecy of the cause pursuant to this section shall be conclusive, but the cause shall relate solely to the welfare of the schools and the pupils thereof* . . ." (Italics added.)

under which the governing boards of local school districts may decline to rehire probationary teachers. At the end of the 1969-1970 academic year, the Governing Board of the Torrance Unified School District[2] terminated petitioner Stanley Lindros, a probationary teacher, because he read a theme to his English class which contained controversial language, and because he allegedly on one occasion allowed students to return needed books to the library without proper authorization.

For the reasons set forth below, we hold that these incidents fail to establish "cause" for termination which is reasonably "relate[d] to the welfare of the schools and pupils thereof" as required by section 13443, subdivision (d); in so doing we note that in both incidents Lindros acted in the good faith pursuit of concededly legitimate educational objectives, and that the Board demonstrated no significant adverse impact on the students or the school.

The Torrance Board employed petitioner as a tenth-grade probationary English teacher at South High School for the 1969-1970 school year. Petitioner's record attested to his eminent qualification for the position. Not only did he hold a California teaching credential but also he had studied for, or obtained, advanced degrees in philosophy, theology, and the communication arts. A Catholic priest on leave of absence

[2]The Governing Board of the Torrance Unified School District will hereinafter be designated as the "Torrance Board" or "Board."

from the Church, petitioner had enjoyed a wide range of experience: he had served as a parish priest, prison chaplain, resident counselor, and secondary level teacher. Nothing in the record suggests that petitioner had failed to fulfill his promise as an effective English instructor or had been unable to relate well with young people; indeed "teacher evaluation" records indicated that he proved himself "above average" in both competency in subject matter and in rapport with students.

The incident which constituted the main charge against the petitioner occurred early in the school year. In mid-October 1969 petitioner assigned his tenth-grade English classes the task of preparing a short story relating a personal emotional experience. The purpose of this assignment, as later described by petitioner, was to stress "the relationship between good creative writing and personal experience. I believe this to be the key in communicating with students and encouraging better writing."

At the request of several students that he present them with an example of his own work, Lindros read a short story, "The Funeral," which he originally wrote as a rough draft for a television play at Loyola University. Autobiographical in nature, the story recorded petitioner's emotions at the funeral of one of his students who, during the time Lindros taught at a predominantly black high school in Watts, died of a heroin overdose. The theme contained language later deemed objectionable by South High's principal—including a

slang expression for an incestuous son. We set forth the full text below:

"The Funeral

"I was mad, disgusted . . . tense. If Agnes hadn't reminded me I'd still be watching *Shoes of a Fisherman* at the film director's studio. But whether it was guilt or concern, I knew that I should be at Ed's funeral at 2 p.m.

"The highway provided me with nothing but a blanket of mist and melancholy. Splashing past 110th and Compton Ave. I caught sight of Greater Antioch Baptist Church just as four of my students were carrying Ed's body into the dismal looking building.

"Water dripped from the ceiling as the small choir intoned, *Come Sweet Jesus.* . . . Only the appearance of plump Rev. Black, Bible in hand, saved us from their uncoordinated efforts.

"I couldn't catch what Black was reading but it was unimportant. I was here, somber, moody, thoughtful; and all to the testimony that I as a white man did care for a young black hipe who died too young . . . too soon.

"Lloyd made it . . .Larry, Fred, Bernard, Fuzzy—they were all there. Seemed like every addict in the community was on the scene with his leather jacket and shades, as if to collect . . . or to pay off to Ed. What a lineup! Sargent [*sic*] Masterson from Precinct 77 would have raised a brow or two at this gathering.

"Kelly had tears streaming down his face, perpetually high . . . who could blame him; deserted father, bitch mother; in and out of jail since thirteen. He shot with Ed for the last time Saturday night.

"The wailing, so characteristic at a Black funeral did not begin until the second stanza of *I Believe,* delivered by Hessie Jones. The little Black kid next to me stared at the solitary tear that rolled down my cheek.

"Why are women so goddam hysterical? Did they really know Ed? Did they care? Were they using Ed's 'time' from their own shackles of welfare and project living? I do not know. I do not live in Watts; but I feel for them now, in their strange melodramatic way.

"Only the obituary read by Sister Maebelle shook me out of my depression. 'Ed Leavy Pollard. Born in Greenwood, Miss., 1952; Died Jan. 11, 1969 . . .' She droned on in a pitifully low, uneducated tone.

"Curley, a steady shooter with Ed was moved to bellow out, 'Louder Lady, I can't hear ya.' Choresetta in the fourth pew from the front responded to this abrupt remark with a deep shaking sob. The storm grew louder. I noticed at least three leaks from the roof now. God, what a depressing hole; wet, dam [*sic*] pictureless, peeling paint, worn, dam pews; only the cossack of Ed and us. 'Only us O Lord,' I thought 'but what the hell are we here for?'

"I sit here white, middleclass, secure, while the goddam system rapes these poor people of every vestage [*sic*] of dignity.

"Rev. Galine, a slick looking 'Tom' began the eulogy; Jeremiah was the scapegoat. First there was the woman in the back row. She was joined by three others; then another . . . and another; soon everyone in the drama had his chance to chant a response back to the Baptist Preacher; 'Oh Lord' . . . 'That's right' . . . 'I'm listnin' . . . 'Speak God.' . . . Only the periodic gasping signs (sobs) interrupted the Rev's show.

"Ed would have rolled over and grimaced if he would have heard the hysterics when David, his classmate, opened his cossack for the finale. The weeping and gnashing lasted long enough for all of us to troop past Ed and glance at his ashen, black face.

"I felt whipped out; this was a strange two hours; strange to a white who had no blackness in him; strange to a white who knew no such poverty and desperation; even stranger outside when I greeted a young Black in a Panther-like outfit: 'White-mother-fuckin Pig.' . . . "

Before reading the controversial words at the end of "The Funeral," petitioner pondered their appropriateness for the classroom, and decided in good faith that their use was permissible in some, but not all, of

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Before reading the controversial words at the end of "The Funeral," petitioner pondered their appropriateness for the classroom, and decided in good faith that their use was permissible in some, but not all, of

his classes.[3] As petitioner stated, although he recognized that "a few words in 'The Funeral' [were] not acceptable in common usage . . . [he] felt that even if one student was to give up or think less of drugs, the reason for reading the play was justifed." Lindros read the young black's objectionable and defiant remark at the end of the story only in college preparatory classes, which he considered most mature; in other classes he substituted the initials "W.M.F.P." While petitioner did not preliminarily consult with school administrators as to whether he should read the story, his conduct accorded with the prevailing policy of the school that instructors could select outside instructional material. According to the hearing officer "There [was] widespread use of outside instructional material selected by the instructors and not submitted for approval." Moreover, school administrators had promulgated "no clear statement of the criteria or standards [to be] applied in selecting this material."

Furthermore, the prevailing practices and conditions at the high school strongly indicated that the in-

[3]Although the hearing officer did not find expressly that Lindros acted in good faith in pursuit of bona fide educational purposes, we believe that such a finding is implicit in the final paragraph of the hearing officer's proposed decision: "Another relevant consideration is the problem of judgment and professionalism. It should require no argument to support the proposition that the District's Governing Board, as the ultimate employer of the teacher on behalf of the citizens of the district, has the right to control the teacher by promulgating the standards of conduct which it deems appropriate. These standards may allow broad discretion or may be explicit. Here, as is true of much in the field of education, a latitude has been allowed for the exercise of the professional judgment of the educational administrators and the teachers. Whenever latitude for judgment is granted there will be inevitable variances in its exercise by the individuals involved. The superior may reasonably anticipate that the subordinate's exercise of judment will vary from his own and, particularly in the case of a beginning employee, that it will be at times erroneous."

clusion of the language in a literary composition would evoke no concern. The library shelved books, readily available to students, which contained words identical to all of those found in "The Funeral"; school administrators, moreover, as part of the curriculum, had permitted instructors to take students to theatrical performances in which the lines spoken by the actors contained the same or similar words.

No disruption of classroom activities followed petitioner's reading of "The Funeral." As the hearing officer noted, "In considering the seriousness of the use of the offending material . . . these words were presented fully or by their initial letters to five classes of a total of approximately 150 students. No complaint arose from the students and none arose from the parents of these students. This will not establish that the material was appropriate for classroom use but does tend to establish that the context and manner of presentation was not nearly so startling to the students who heard it . . . as the disembodied restatement of the offending words makes it appear."

Despite this seemingly indifferent reaction, the principal of the high school learned of the incident and reprimanded Lindros. The principal counseled Lindros that the language of the short story did not accord with established classroom usage and that further use of vulgar material should be avoided; petitioner agreed to abide by this directive and signed a statement to that effect. This meeting closed the in-

cident until the end of the school year, some eight months later, when the Torrance Board announced that if would not rehire Lindros. As both the hearing officer and the superior court later found, the reading of "The Funeral" constituted the "gravamen" of the Torrance Board's complaint against Lindros.[4]

In addition to the incident involving "The Funeral," the hearing officer found Lindros to have permitted students to leave class on one occasion without the authorization normally required by school regulations.[5] On February 6, 1970, petitioner allowed stu-

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[4]The superior court declared that "the substantive charge involved, as the hearing officer said, and I agree with him, the gravamen of these proceedings [was] the use of this short story, 'The Funeral,' with its coarse language at the end"; the hearing officer, however, found that the "gavamen" of the charges against Lindros included not only the reading of "The Funeral" but also the use of copies of the lyrics from the song "The Pusher" in one of Lindros' classes on January 30, 1970. These lyrics were distributed by one of Lindros' students who presented a class report on drug use. "The Pusher," according to the findings of the hearing officer, was a popular score taken from the motion picture "Easy Rider" and was at the time widely disseminated in radio broadcasts and readily available in phonographic record shops. In fact, the lyrics of "The Pusher" had been used by other instructors at South High School. The hearing officer concluded that "The Pusher" was a work of "established usage" and that its use did not constitute "cause" within the meaning of Education Code section 13443. The Torrance Board later adopted this finding as its own; thus this alleged incident of "misconduct" is not before us here. Other minor charges against petitioner—not discussed in the text—were rejected by the hearing officer or the superior court. (See fn. 5, *infra*.)

[5]Lindros was originally charged with three additional isolated incidents of misconduct. First, he allegedly permitted students to write vulgar phrases on their desks and on the bulletin board on a single day in December. As to this charge, the hearing officer found that "The necessarily alleged element of permission was not established" since "[i]t was affirmatively established that [petitioner] had neither by word nor by deed caused the inscribing of these words."

In addition, Lindros was charged with, on one occasion, uttering a swear word at a fellow teacher in the presence of a third teacher. He apologized the next day. The hearing officer found that "while objectionable" this incident occurred "privately between two men in disagreement and has had no substantial impact upon the school or the pupils thereof, and therefore, does not constitute a cause not to rehire . . . within the meaning of section 13443." The Torrance Board ultimately accepted this conclusion as its own.

Finally, petitioner was charged with leaving his classroom unattended for a few minutes on a single day in October in violation of school regulations. The superior court found thi sallegation unsupported by substantial evidence and the Torrance Board has not challenged that determination here.

dents in one class to depart a few minutes before the "sounding of the bell signalling the close of the class session." Lindros "had instructed those of his students who were in possession of a book entitled *Zorba the Greek* to depart from class early, secure the book from their lockers, and return the book to the library so that it could be redistributed when needed by the students of another English instructor. . . . It was not established that all of those students who departed were leaving to complete this errand."

After the superintendent of the Torrance School District served notice of an intention not to rehire Lindros because of the aforementioned incidents, the Board held an administrative hearing pursuant to subdivision (b) of section 13443. At this proceeding the hearing officer found that " 'The Funeral' is not within the generally accepted standard and that its use would violate the policy of the school in regard to the introduction of objectionable language into the classroom." He further found that although "[t]he school does sanction the use of literary work and current periodical material in which socially unacceptable words and phrases appear . . . [The Funeral] is not a generally accepted literary work and does not appear within a generally accepted periodical. [Petitioner's] lapse of judgment and violation of standards is a factor relating to the welfare of the students and the school." Though he found that the incident involving "The Funeral" was the 'gravamen" of the complaint,

the hearing officer also declared that the February 6, 1970, incident involving early dismissal of students from class constituted "cause" under section 13443.

The Torrance Board, without examining the record of the administrative hearing, adopted the hearing officer's report as its own; the Board further declared that each charge "separately and collectively" constitute[d] . . . sufficient cause not to reemploy [petitioner]."

Following the Torrance Board's final decision, Lindros petitioned the Los Angeles Superior Court for a writ of mandate under Code of Civil Procedure section 1094.5. In denying the petition the superior court declared that the language of "The Funeral" is "manifestly coarse and vulgar" and that "[p]etitioner should have known that such language by a teacher was totally unacceptable in a Tenth Grade English class." The superior court then noted that the charges relating to both "The Funeral" and the February 6, 1970, incident involving early dismissal of students "were found to be related to the welfare of the school and the pupils thereof, and the Governing Board's determination of sufficiency is conclusive." We believe that this holding cannot be sustained because petitioner's conduct did not, as a matter, of law, constitute cause for termination within the meaning of Education Code section 13443. We turn now to an analysis of section 13443, and of the errors which we perceive in the superior court's denial of the writ of mandate.

I. *The question whether alleged misconduct establishes "cause" under section 13443, subdivision (d), constitutes a question of law.*

Education Code section 13443, subdivision (d) defines the conditions under which a local school board can refuse to rehire a probationary teacher. The statute provides that: "The governing board's determination not to reemploy a probationary employee for the ensuing school year shall be for cause only. The determination of the governing board as to the sufficiency of the cause pursuant to this section shall be conclusive, but the cause shall relate solely to the welfare of the schools and the pupils thereof . . ."

(1) The precedents clearly establish that the question whether a particular cause for refusal to rehire relates "solely to the welfare of the schools and the pupils thereof" presents a matter of law that must be determined by the courts and, ultimately by this court. The Board determines the *facts* and their sufficiency to support the Board's determination but the court decides whether the facts as found—in our case, the conduct of the teacher—reasonably could be said to have adversely affected the welfare of the school or its pupils.

In the fountainhead case of *Griggs v. Board of Trustees* (1964) 61 Cal.2d 93 [37 Cal.Rptr. 194, 389 P.2d 722], a school board refused to rehire a probationary teacher for "lack of self-restraint and tact in dealing with co-workers, pupils, and parents." (*Id.* at

p. 97.) We interpreted section 13443 (then § 13444) to mean that "where there is evidence to support the board's findings of fact *and where the cause for dismissal found by the board can reasonably be said to relate to the 'welfare of the schools and pupils thereof,'* the reviewing court may not consider whether the facts found are sufficiently serious to justify dismissal." (*Id.* at p. 96.) (Italics added.) The *Griggs* court then found a reasonable relationship between the "cause" (lack of tact) and the "welfare of the schools." (*Id.* at p. 97.)

We more recently examined the division of responsibilities between courts and governing boards under section 13443 in *Bekiaris v. Board of Education* (1972) 6 Cal.3d 575 [100 Cal.Rptr. 16, 493 P.2d 480]. "It is to be emphasized . . . that [under section 13443] the general applicability of the rule of substantial evidence in light of the entire record does not affect the power and duty of the trial court to make an independent determination of questions having a legal character. Thus '[n]othing . . . prevents the reviewing court from determining whether the board has proceeded in excess of jurisdiction, whether there has been a fair trial, and whether the board's findings of fact are supported by substantial evidence.' [Citation.] Moreover, it is for the *court to determine whether a particular cause for dismissal relate*[*s*] *solely to the welfare of the schools and the pupils thereof'* as required by section 13443. [citations.]" (*Id.* at p. 587.) (Italics added.)

We further explained that "although the reviewing court must accept evidentiary facts shown by substantial evidence and the sufficiency of those facts to constitute a stated cause, still it remains for the court to determine *as a matter of law* whether such cause relates to the welfare of the school and its pupils and is therefore adequate under the provisions of section 13443 to justify dismissal." (*Id.* at p. 589.) (Italics in the opinion.)

The Courts of Appeal have consistently followed this approach. Thus, the court in *Blodgett v. Board of Trustees* (1971) 20 Cal.App.3d 183 [97 Cal.Rptr. 406], held that refusal to rehire a probationary teacher solely because she was overweight was not a "cause" reasonably related to school welfare; the "physical condition unrelated to the plaintiff's fitness to teach was used as a pretext for refusing re-employ[ment]." (*Id.* at p. 193.) In *Thornton v. Board of Trustees* (1968) 262 Cal.App.2d 761 [68 Cal.Rptr. 842], the Court of Appeal held refusal to rehire solely because a probationary teacher was 65 years old was not "cause"[6] reasonably related to the welfare of the school.

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[6]In 1969 the Legislature, in response to the *Thornton* holding, amended Education Code section 13325 to make it apply to probationary, as well as permanent, employees (Stats. 1969, ch. 795, p. 1613, § 1); section 13325 provides that upon reaching age 65 "employment shall be from year to year at the discretion of the governing board." In extending to governing boards this plenary power over probationary teachers reaching the age of 65 (*Taylor v. Board of Education* (1939) 31 Cal.App.2d 734 [89 P.2d 148]), the Legislature impliedly recognized that the authority of governing boards is not as extensive under section 13443. (*Ladd v. Board of Trustees* (1972) 23 Cal. App.3d 984, 989-991 [100 Cal.Rptr. 571].)

In sum, whether particular conduct establishes cause under section 13443, poses a pure question of law. This question must be sharply distinguished from two other types of questions which arise under section 13443: (1) questions of *fact* and (2) questions as to the *sufficiency* of the "cause" to warrant dismissal in light of all the circumstances. Past cases have held that findings of fact, developed by the hearing officer and the governing board, will be upheld by the courts so long as supported by substantial evidence on the whole record. (*Griggs v. Board of Trustees, supra,* 61 Cal.2d at p. 96.)[7] Similarly, the determination as to the "sufficiency of the cause"—whether the "cause" warrants a refusal to rehire despite the teacher's redeeming qualities as a teacher, his attitude, and the particular needs of the school district—lies solely in the discretion of the governing board *so long as* section 13443's requirement of "cause . . . relate[d] solely to the welfare of the schools and the pupils thereof . . ." has been met (*Bekiaris v. Board of Education, supra,* 6 Cal.3d at p. 589.)

Having demonstrated that the determination of "cause" under section 13443 constitutes a question of law, we turn to an examination of that issue in light of the two charges of misconduct against petitioner Lindros.

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[7]Since neither party has challenged the applicability of the substantial evidence scope of review to this proceeding, we have not addressed the question whether a higher standard of review should apply.

II. *The reading of "The Funeral" did not constitute "cause" under section 13443.*

(2) Lindros' reading of the composition did not constitute "cause" under section 13443 because, first, in presenting it to his pupils petitioner sought to pursue a bona fide educational purpose and in so doing did not adversely affect "the welfare of the schools or the pupils thereof"; second, the composition was used as teaching material without prior reasonable notice that such use would later be deemed impermissible by school authorities. We shall separately analyze each of these propositions.

A. *In reading "The Funeral" petitioner sought to pursue a bona fide educational purpose and in so doing did not adversely affect the welfare of the school or the pupils thereof.*

Erroneously applying a per se approach to the controversial epithet at the end of "The Funeral," the superior court declared that its use was "manifestly coarse and vulgar." The court, however, apparently failed to make the crucial distinction between unrestricted use of such words in the classroom and their inclusion in teaching material for a class in creative writing.

Petitioner is the first to concede that it would be "outrageous . . . if a teacher simply shouts 'motherfucking-pigs' to his students." Obviously teachers are not to sanction the use of words as blatantly offensive

as these in classroom discussion or even in the personal banter of students. But here the words were used by a character in a story; the story, in turn was presented as an example of expressive writing. The black character utters the words in "The Funeral" as a mark of his anger and disgust at a white's presence at the funeral; the words were employed for a definite literary objective. Thus, Lindros read the story to his students as part of a quite obvious teaching technique.

Many classic works seeking to capture the anger of blacks against a society that they consider inexcusably oppressive are peppered with epithets that express outrage in terms at least as violent as that used here. Malamud's "The Tenants" is a recent example; "Man-Child in a Promised Land" by Claude Brown is another. Baldwin's "The Fire Next Time," written, as it is, by a black, is the most virulent; we could cite innumerable other examples. The writer of "The Funeral" could not properly convey the fury of the young black at the apparent condescension of a white man in attending the funeral except by the use of an expletive. The outrage of the black *had* to be mirrored in language that outraged.

Lindros was obviously trying to teach his students that in writing creative compositions the author must attempt to put those words in the mouths of his characters that belong there. The blasphemous epithet must fit the emotional outburst of the speaker. To isolate the epithet and to condemn the teacher is to miss the

function of expressive writing. In sum, we could not impose upon teachers of writing, as a matter of law, that they must tell and teach their students that in depicting the jargon of the ghetto, the slum, or the barrack room, characters must speak in the pedantry of Edwardian English.

The record shows that neither student nor parent complained about this use of the lurid words in Lindros' composition. The students had been exposed to identical language in books and periodicals in the school library; their teachers had taken them to dramatic productions that used these and other obnoxious terms. That the students were not "shocked" can come as no surprise.

Finally, the United States Supreme Court has recognized the widespread use of current, divergent and distasteful patterns of speech, such as those involved here; indeed, in some situations that court has accorded constitutional protection to similarly shocking and offensive language. For example, the Supreme Court recently held the phrase "fuck the draft" protected by the First Amendment when portrayed on a jacket worn in a courthouse corridor. (*Cohen v. California* (1971) 403 U.S. 15 [29 L.Ed.2d 284, 91 S.Ct. 1780].) Although *Cohen* involved a controversial term in expressing a political view in a public forum and is thus distinguishable from the instant situation, we note its reasoning: "How is one to distinguish this from other offensive word? Surely the State has no right to cleanse

public debate to the point where it is grammatically palatable to the most squeamish among us. Yet no readily ascertainable general principle exisits for stopping short of that result were we to affirm the judgment below. For, while the particular four-letter word being litigated here is perhaps more distasteful than most others of its genre, it is nevertheless often true that one man's vulgarity is another's lyric." (*Cohen v. California, supra,* 403 U.S. at p. 25 [29 L.Ed.2d at page 294].)

Three recent cases in which the Supreme Court vacated criminal convictions for offensive speech and remanded in light of *Cohen v. California, supra,* 403 U.S. 15, illustrate the same point. In *Rosenfeld v. New Jersey* (1972) 408 U.S. 901 [33 L.Ed.2d 321, —— S.Ct. ——], the defendant was convicted of disturbing the peace by indecent and offensive language; he had addressed a school board meeting, attended by some 40 children, using, on several occasions in his speech, the words "mother fucker"; in *Brown v. Oklahoma* (1972) 408 U.S. 914 [33 L.Ed.2d 326, —— S.Ct. ——], the defendant, during a speech before a group of men and women in the University of Tulsa chapel, referred to policemen as "mother fucking fascist pig cops"; in *Lewis v. City of New Orleans* (1972) 408 U.S. 913 [33 L.Ed.2d 321, —— S.Ct. ——], a mother addressed police officers who had arrested her son as "god-damned-mother-fucking-police."

These cases illustrate both the use of such speech in sections of our multifarious society and an increasing

immunity from criminal sanction for such expressions. While these rulings by no mean legitimize the general use of offensive language in the classroom, they do explain the background and reasons for the use of such words in literary works depicting realistically the coarse and strident forms of communication that so often attend public dialogue today.[8]

We conclude that the Board has failed to show that the inclusion of opprobrious language currently used in many subcultures, in a single composition, presented solely for teaching purposes, rises to the level of a legal cause for severance of a teacher from his employment.

B. *The reading was only a single incident in the presentation of teaching material which, although later deemed objectionable, was used in the absence of prior reasonable notice that such use would be deemed impermissible by the school authorities.*

As we have pointed out, the accepted policy at South High School permitted the selection of instructional material by teachers without submission to administrators for advanced approval. Moreover, as we have explained, books and periodicals at the school library contained language as controversial as that

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[8]"If standards of taste of future generations are to be elevated it will not be accomplished by those who seek to sweep distasteful matters under the rug, or by self-embarrassed school trustees who discharge as unfit those who would bring the problem out in the open for discussion." (*Oakland Unified Sch. Dist. v. Olicker* (1972) 25 Cal.App.3d 1098, 1112 [102 Cal.Rptr. 421] (Sims, J., concurring.).) Several federal cases illustrate the serious constitutional questions which arise when school authorities seek to curb the academic freedom of teachers to employ techniques supported by substantial opinion in the teaching profession. (*Keefe v. Geanakos* (1st Cir. 1969) 418 F.2d 359; *Parducci v. Rutland* (M.D.Ala. 1970) 316 F.Supp. 352.)

found in "The Funeral"; further, students with the sponsorship of their teachers attended plays in which such language was employed. In the previous section we have alluded to the unfortunate current prevalence of language as repulsive as that we face here. The record shows no specific disapproval of the use of written material containing such expressions. Under these circumstances we must conclude that petitioner acting in good faith, presented the composition to the class without prior reasonable notice that such presentation would contravene the governing policies of the high school.[9]

We do not believe that one isolated classroom usage of material later deemed objectionable by school administrators, without reasonable prior notice, can constitute "cause" for termination reasonably "relate[d] solely to the welfare of the schools or pupils thereof." "Cause" under section 13443 requires that the teacher must have failed to exercise such reasonable judgment as would be expected of a member of his profession under the same circumstances. "Teachers, particularly in the light of their professional expertise, will normally be able to determine what kind of conduct indicates unfitness to teach. Teachers are further protected by the fact that they cannot be disciplined mere-

[9]We reject the assertion of the respondent Torrance Board that because petitioner refrained from actually reading the controversial words in question in some of his classes, he necessarily knew their use would be considered objectionable. To the contrary, Lindros' discriminating use of the controversial language in his more mature college prep classes only demonstrates his good faith effort to discern when the usage would serve a bona fide educational purpose.

ly because they made a reasonable, good faith, professional judgment in the course of their employment with which higher authorities later disagreed." (*Morrison v. State Board of Education* (1969) 1 Cal.3d 214 233 [82 Cal.Rptr. 175, 461 P.2d 375].)[10]

III. *The incident involving dismissal of students on one school day fails to establish "cause" reasonably related to the welfare of the schools and was not the true reason for the Board's refusal to rehire Lindros.*

(3) We turn to the remaining charge that on one occasion during the school year Lindros permitted students to leave one of his classes "without proper authorization." A close review of the findings pertinent to the incident reveals that it was not conclusively established that Lindros violated any school rule, and that, in any event, the isolated *de minimis* violation charged was a mere makeweight that did not constitute the true reason for the Board's refusal to rehire Lindros.

The hearing officer's findings of fact, later adopted by both the Torrance Board and the superior court, contain ambiguities which cast doubt on the asser-

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[10]See *Oakland Unified Sch. Dist. v. Olicker* (1972) 25 Cal.App.3d 1098, 1110 [102 Cal.Rptr. 421], applying the same reasoning as to lack of notice to a teacher dismissal case under Education Code section 13403. Several federal cases, moreover, have accepted the notice argument in the context of constitutional due process and academic freedom challenges to teacher dismissals. (See *Mailloux v. Kiley* (D.Mass. 1971) 323 F.Supp. 1387, affd. 448 F.2d 1242; *Keefe v. Geanakos* (1st Cir. 1969) 418 F.2d 359, 362; *Webb v. Lake Mills Community School District* (N.D. Iowa 1972) 344 F.Supp. 791, 800-801, 804-805; *Parducci v. Rutland* (M..D.Ala. 1970) 316 F.Supp. 352, 357; cf. *Presidents Council, Dist. 25 v. Community Sch. Bd. No. 25* (2d Cir. 1972) 457 F.2d 289, 293-294.)

tion that Lindros improperly dismissed his class;[11] these ambiguities strengthen our conclusion that the charge of improper dismissal of students did not trigger the action against Lindros. The record indicates that on February 6, 1970, Lindros dismissed some students for the legitimate educational purpose of returning needed copies of the book, *Zorba the Greek,* to the library. Nothing suggests that this action, by itself, violated any school rule. Although it "was not established that all of those students who departed" actually followed petitioner's instructions, Lindros could hardly be dismissed merely because he failed to prove that all of the students obeyed his instructions and went to the library after leaving his classroom. Thus the findings of fact could not support a conclusion that Lindros failed to "authorize" his students to go to the library.[12]

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[11]We set forth the full findings pertinent to this issue: "F. On approximately February 6, 1970, at the close of a class session the students in the class then being instructed by respondent departed from the room with few exceptions and without being dismissed by respondent and prior to the sounding of the bell signalling the close of the class session. It was established that on this date respondent had instructed those of his students who were in possession of a book entitled "Zorba the Greek" to depart from class early, secure the book from their lockers, and return the book to the library so it could be redistributed on the morning of February 19th when it was needed by the students of another English instructor. It was not established that all of those students who departed were leaving to complete this errand. It is contrary to school policy to permit students to be out of class during the class time without a proper pass, with the limited exception that five students at a time may be permitted to be in the hallway for the purpose of obtaining or returning books at the bookroom in the library."

[12]One of petitioner's supervisors, the sole witness for the Board on the charge of early dismissal of students, testified that he observed students leave Lindros' class *without any authorization.* Petitioner's testimony contradicted that of his supervisor; petitioner attested that he authorized his students to leave class to return copies of *Zorba the Greek* to the library. Testimony of other teachers indicated that Lindros had been asked to arrange for the return of these books. Though the findings of the hearing officer (*supra,* fn. 11) contain ambiguities, apparently the hearing officer accepted petitioner's version that he *did not* dismiss his class early, but rather authorized his students to go to the library.

As the hearing officer found, however, de facto school policy required a teacher to provide a *written* authorization when sending more than five students to the library; conceivably, Lindros violated a school regulation, not by dismissing his students, but by failing on this single occasion to furnish a written "hall pass." The hearing officer's decision, however, omitted any findings about this vital fact. The findings therefore do not directly support even the conclusion that Lindros dismissed the students without proper *written* authorization. (Cf. *Alameda-Santa Clara Vineyards v. Paul* (1966) 239 Cal.App.2d 860, 867-868 [49 Cal.Rptr. 256].)

In any event, the record makes clear that the reading of "The Funeral" comprised the "gravamen" of the charges, and that the refusal to rehire rested upon this foundation. We are reminded here of the incisive language of *Bekiaris v. Board of Education, supra,* 6 Cal.3d 575, 592-593, that "a dismissed public employee is entitled to a judicial determination of the *true* reason for his dismissal . . ." (italics in the original). Although *Bekiaris* condemned a dismissal involving constitutional rights, its logic equally applies in the instant situation involving statutory rights. Since both the hearing officer and superior court found that "The Funeral" comprised the "gravamen" of the complaint against petitioner, we believe that charge was the "true reason" for the refusal to rehire.[13]

[13]As the superior court declared, "That brings us to what I suppose might be called *the substantive charge* involved, as the hearing officer said, and I

Furthermore, to assume that the Torrance Board would have refused to rehire Lindros based *solely* on the incident of February 6 stretches the credible. The incident at most involved a single, unrepeated infraction of a minor regulation in mid-year, with no showing of any adverse impact on the educational process, and with no showing that it occurred by other than mere inadvertence. We doubt that the Torrance Board would have acted so harshly as to ignore Shakespeare's common sense observation that "men are men; the best sometimes forget." (Shakespeare, Othello, II (1604).)[14]

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agree with him, the *gravamen* of these proceedings, that is, the use of this short story, "The Funeral." (Italics added.) The meanings of "gravamen" is clear; "gravamen" means the "material part of a grievance, charge, etc." (Webster's New Internat. Dict. (2d ed. 1957) unabridged.)

This conclusion of the hearing officer and superior court was supported by substantial evidence. The principal of South High School testified that he would not have recommended against rehiring Lindros based solely on the alleged dismissal of students without proper authorization.

"Q: [hearing officer] 'The Funeral' was the most compelling incident?

"A: [the principal] Yes.

" . . . . . .

"Q: . . . That's not a very good question, but would you have based a recommendation of not to rehire a teacher upon an incident [of] permitting students to leave?

"A: Perhaps not."

[14]We find further support for our conclusion that the gravamen for the refusal to rehire was the reading of "The Funeral" in the action of the Torrance Board itself; the Board, in effect, agreed that the incident involving "The Funeral" constituted the material complaint. Although the Board declared that the charges "separately and collectively constitute[d] . . . sufficient cause not to reemploy," the Board also accepted the position of the hearing officer that the charge relating to "The Funeral" formed the real basis for the action against petitioner. As the Board concedes, under section 13443, subdivision (c) the hearing officer conducts a hearing and prepared a proposed decision; based on the record of this hearing and the "proposed decision" the Board then makes its determination; under the Government Code the Board can *either* adopt the "proposed decision" *in its entirety* (Gov. Code, § 11517, subd. (b)) or make further findings "upon the record" of the administrative hearing (Gov. Code, § 11517, subd. (c)). Here the Board did *not* examine the record of the adminstrative hearing or make further findings; accordingly, it adopted the hearing officer's determination in *its entirety* under section 11517, subdivision (b)—including the finding that "The Funeral" constituted the gravamen of the complaint.

Summarizing the case as a whole, we conclude that the Board's refusal to rehire petitioner was invalid because it was not for cause reasonably related to the Welfare of the school.[15] We heed Judge Wyzanski's characterization of fundamental public policy: that education must "foster open minds, creative imaginations and adventurous spirits. Our national belief is that the heterodox as well as the orthodox are a source of individual and of social growth. We do not confine academic freedom to conventional teachers or to those who can get a majority vote from their colleagues. Our faith is that the teacher's freedom to choose among options for which there is any substantial support will increase his intellectual vitality and his moral strength. The teacher whose responsibility has been nourished by independence, enterprise, and free choice becomes for his student a better model of the democratic citizen." (*Mailloux v. Kiley* (D.Mass. 1971) 323 F.Supp. 1387, 1391.)

The judgment of the superior court denying the writ of mandate is reversed, and the cause is remanded to the superior court for proceedings consistent with this opinion.

Wright, C. J., Mosk, J., Sullivan, J., and Roth, J.* concurred.

BURKE, J.—I dissent. The majority have wholly emasculated the provisions of section 13443, subdivision

[15]We therefore need not reach petitioner's other contention that his discharge was invalid on various procedural grounds as well.

*Assigned by the Chairman of the Judicial Council.

(d), of the Education Code which, until now, assured that a local school board's decision as to the sufficiency of the cause for failing to reemploy a probationary teacher was *conclusive* and free from judicial interference. The "cause" which lead defendant district to refuse to reemploy Lindros was his *classroom* use of improper, indecent language. Since the use of such language in a tenth-grade classroom obviously is a matter of relating to "the welfare of the schools and the pupils thereof . . ." (Ed. Code, § 13443, subd. (d))fi the district's determination concerning the sufficiency of that cause should have been "conclusive." (*Id.*) Instead, the majority have rendered that determination wholly *inconclusive,* by relying upon a variety of supposedly mitigating factors (such as Lindros' asserted "good faith") which more properly were matters of sole concern to the district in appraising the sufficiency of the cause for terminating Lindros' services. More importantly, however, and wholly apart from the particular circumstances surrounding this case, the majority's approach can be employed in future cases involving probationary teachers to undermine and defeat the clear legislative intent to vest in the local school board plenary control over these matters.

Section 13443, subdivision (d), carefuly allocates the respective responsibilities of the school boards and the courts in cases involving refusals to rehire probationary teachers. That section expressly makes the governing board's determination as to the sufficiency

of the cause "conclusive," so long as that cause relates to the welfare of the school or its pupils. As stated in *Griggs v. Board of Trustees,* 61 Cal.2d 93, 96 [37 Cal. Rptr. 194, 389 P.2d 722], the landmark case in this area, "Nothing in the language of section 13444 [now § 13443] prevents the reviewing court from determining whether the board has proceeded in excess of jurisdiction, whether there has been a fair trial, and whether the board's findings of fact are supported by substantial evidence. However, *where there is evidence to support the board's findings of fact and where the cause for dismissal found by the board can reasonably be said to relate to the 'welfare of the schools and the pupils thereof,' the reviewing court may not consider whether the facts found are sufficiently serious to justify dismissal.*" (Italics added.)

In *Griggs,* the "cause" for the board's decision was the teacher's "lack of self-restraint and tact in dealing with co-workers, pupils and parents." Since substantial evidence existed to support the existence of that cause, and since that cause "is clearly a matter which relates to the welfare of the school and its pupils," this court held that "the trial court could not properly substitute its own judgment for that of the board on the question of the sufficiency of the cause for Mrs. Griggs' dismissal." (P. 97.) I stress the fact that this court did not purport to reappraise the "good faith," "lack of significant adverse impact," or other possible mitigating factors in Mrs. Griggs' favor, unlike the majority's approach in this case, for such mat-

ters were exclusively within the domain of the school board.[1]

Subsequent cases have uniformly employed the *Griggs'* approach, namely, to determine only whether or not the *type* of conduct at issue (e.g., lack of tact) can be said to reasonably relate to the welfare of the school and its pupils. For example, in *Raney v. Board of Trustees,* 239 Cal.App.2d 256 [48 Cal.Rptr. 555], the "cause" relied upon by the school board was the teacher's severe grading techniques and poor rapport with students. The court explained that were it at liberty to supervise the judgment of the board on the matter, the court "might well reach an opposite conclusion . . . [*B*]*ut our theory of government gives to the school trustees, for better or for worse, an almost absolute choice either to 'hire or fire' teachers who have not yet attained tenure.*" (Italics added; p. 260.)

Similarly, in *American Federation of Teachers v. San Lorenzo etc. Sch. Dist.,* 276 Cal.App.2d 132, 136 [80 Cal.Rptr. 758], the court held that a probationary teacher's inability to accept responsibility and inadequate supervision of students "certainly relate to the welfare of the schools and the pupils . . ." According-

[1]The majority have substantially misstated the test set forth in section 13443 and the Griggs case. Although correctly explaining that the role of the courts is limited to determining whether the cause for termination *relates* to the welfare of the school or its pupils (slip opn., pp. 532-534) the majority purport to apply that test by inquiring whether in fact the teacher's conduct *adversely affected* the welfare of the school or its pupils. (*Id.,* at p. 527, line 10, p. 533, line 9, p. 535, line 5, pp. 535-537.) Yet the question of adverse effect is precisely the question reserved to the school board by section 13443 —otherwise a court could in every case reverse the board's decision by finding that particular conduct had no "significant adverse impact" (*id.,* at p. 527, line 10) on the school or its pupils.

ly, the court explained that it "cannot consider whether the charges justify dismissal." (See also *Governing Board v. Brennan,* 18 Cal.App.3d 396 [95 Cal.Rptr. 721] [teacher advocated marijuana use]; *McGlone v. Mt. Diablo Unified Sch. Dist.,* 3 Cal.App.3d 17 [82 Cal.Rptr. 225] [failure to supervise students]; *Feist v. Rowe,* 3 Cal.App.3d 404 [83 Cal.Rptr. 465].)

The two cases which reversed school board decisions in this area are not on point for they merely established that physical characteristics of a teacher, such as advanced age or obesity, cannot constitute "cause" under section 13443 since neither factor standing alone could involve the welfare of the school or students. In the instant case, on the other hand, the cause for Lindros' termination was his *classroom* use of indecent language, a matter which (like the lack of tact in *Griggs,* the severe grading techniques in *Raney,* or the inadequate supervision in *San Lorenzo*) by its very nature relates to the welfare of the school and its pupils. Of course, depending upon the underlying circumstances in each case, including the teacher's "good faith" or the lack of any "significant adverse impact," the school board might determine that a particular act or improprietry is excusable and insufficient cause for refusal to reemploy. Yet that decision lies with the school board, not the courts.

As I interpret section 13443, the Legislature intended to vest the school board with sole discretion in appraising the sufficiency of the cause, but to assure

that the cause asserted has some reasonable relation to the school and its pupils rather than pertaining solely to the teacher's private life, unrelated to school affairs. For example, a court might properly hold that a teacher's persistent refusal to obey his parents, his inability to teach his wife how to drive, his failure to keep timely dental appointments, or his intemperate language with his neighbors, were acts of a type which could not reasonably relate to the welfare of the school or its pupils under section 13443. Yet similar acts of insubordination, incompetence, tardiness or use of indecent language, when occurring in a classroom setting or otherwise affecting school affairs, clearly would meet the statutory test.

In the instant case, Lindros used language *in his classroom* which many persons deem objectionable in any context.[2] Indeed, it is well established that even permanent, tenured teachers are subject to appropriate discipline, including dismissal, on account of their classroom use of indecent or profane language. (See *Board of Trustees v. Metzger,* 8 Cal.3d 206, 212 [104 Cal.Rptr. 452, 501 P.2d 1172]; *Palo Verde etc. Sch. Dist. v. Hensey,* 9 Cal.App.3d 967 [88 Cal.Rptr. 570].) Accordingly, the district certainly has statutory authority to refuse to reemploy Lindros for the coming year.

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[2]Since the district's action in this case can be sustained on the basis of Lindros' improper language in his classroom, I do not reach the question whether that action could also be upheld on the independent ground that Lindros permitted unauthorized departure of students from his class.

The majority stress such factors as Lindros' "good faith," his "bona fide educational purpose," the lack of complaints from his students, and the absence of school rules or regulations prohibiting the use of crude and vulgar language by teachers. Once again, it is apparent to me that consideration of such allegedly mitigating factors is for the school board, not the courts. If the board, in the exercise of its discretion and expertise, chooses not to reemploy a probationary teacher who uses such language, on what basis can this court interfere with that decision? Certainly there is no rule of law, statutory or otherwise, which would require advance publication of elaborate regulations and guideline anticipating all possible infractions or misconduct which a probationary teacher might commit.[3] As the trial court pointed out, Lindros' language was "manifestly coarse and vulgar . . .[P]etitioner should have known that such language by a teacher was totally unacceptable in a Tenth Grade English class."

The Court of Appeal, Second District, in the vacated opinion in this case written by Presiding Justice Ford (103 Cal.Rptr. 188), aptly disposed of plaintiff's contention regarding lack of notice: "There is no ironclad rule of law that regulations or rules be promulgated which specify in minute detail the various kinds of misconduct which will subject a teacher to disciplin-

[3]The majority's reliance upon the so-called "free-speech" cases (e.g., *Cohen v. California*, 403 U.S. 15 [29 L.Ed.2d 284, 91 S.Ct. 1780]), seems wholly misplaced, for no attempt is made to subject Lindros to criminal liability for his conduct. As conceded by the majority (p. 537, lines 10-11), "these rulings by no means legitimize the general use of offensive language in the classroom. . . ."

ary action. It is not unreasonable to assume that a person engaged in the profession of teaching will have a reasonable concept of generally accepted standards relating to propriety of conduct, including the avoidance of vulgarity, and will adhere to such standards in his relationship with his pupils. . . .

"Adhering to an objective standard, in the present case it was not unreasonable to determine that the plaintiff was on notice that in teaching his tenth grade English classes the art of writing a short story and in affording his students aid by using as a model a short story written by him, resort to a particular story embodying vulgarity would not serve a substantial educational purpose but would constitute a serious impropriety because of the extraneous matter of an unexemplary nature. Since manifestly inherent in such conduct was the probability of an effect adverse to the welfare of students, it was reasonable to assume that the teacher was aware that he was thereby subjecting himself to the hazard of disciplinary measures. Consequently, his contention as to the lack of adequate notice to satisfy the concept of due process is untenable."

I would conclude that the trial court properly denied mandate in this case, and, accordingly, would affirm the judgment.

McComb, J., concurred.

APPENDIX "C"

OPINION OF THE CALIFORNIA COURT OF APPEAL, SECOND DISTRICT (VACATED)

Stanley M. LINDROS, Plaintiff
and Appellant,
v.
GOVERNING BOARD OF the TORRANCE UNIFIED SCHOOL DISTRICT, Defendant and Respondent.

Civ. 38143.
Court of Appeal, Second District,
Division 3.

June 14, 1972.
As Modified June 20, 1972.
Hearing Granted Sept. 7, 1972.

Arthur J. Grebow and Stephen E. Kalish, Los Angeles, for plaintiff-appellant.

John D. Maharg, County Counsel, and Kenneth E. Reynolds, John J. Wagner and Howard R. Gilstrap, Deputy County Counsel, for defendant-respondent.

FORD, Presiding Justice.

This is an appeal by the plaintiff from a judgment denying his application for a writ of mandate to compel the defendant Governing Board of the Torrance

Unified School District to set aside its decision not to rehire the plaintiff, a probationary teacher, for the ensuing school year.

On or about March 13, 1970, the board served the plaintiff, Mr. Lindros, with written notice, pursuant to section 13443 of the Education Code, that it was recommended that he not be reemployed for the 1970-1971 school year. Thereafter the plaintiff made a timely request for a hearing. A hearing was held before a hearing officer of the Office of Administrative Procedure on May 4, 5, 6 and 7, 1970. The hearing officer submitted his proposed decision, dated May 22, 1970, to the board.[1]

In his proposed decision the hearing officer made findings of fact and a determination that the three charges which were sustained by the evidence were related to the welfare of the school and the pupils thereof. The court in the mandamus proceeding found that there was no substantial evidence to support the findings as to one of the three charges. Consequently, in this opinion reference will be made primarily to the two charges to which the denial of the petition for a writ of mandate related.

The principal charge is set forth in the hearing officer's proposed decision as follows: "A Respondent's

[1]Section 13443, subdivision (c), is in part as follows: "(3) the hearing shall be conducted by a hearing officer who shall prepare a proposed decision, containing findings of fact and a determination as to whether the charges sustained by the evidence are related to the welfare of the schools and the pupils thereof, but the proposed decision shall not contain a determination as to the sufficiency of the cause or a recommendation as to disposition, which sufficiency and disposition shall be determined by the governing board."

assignment within Torrance Unified School District was as an English teacher in the tenth grade at South High School. As part of the class work respondent assigned to his pupils the task of preparing a short story in which they related a personal emotional experience. In response to the requests of several of his students that he present to them an example of his own work, respondent read the following short story aloud to each of his five tenth grade English classes. In one or more of the classes respondent fully articulated all of the words appearing in the text of the story. In other classes respondent used only the initial letters for the expression 'White-mother-fuckin Pig' appearing at the end of the story.

'The Funeral

'I was mad, disgusted . . . tense. If Agnes hadn't reminded me I'd still be watching, *Shoes of a Fisherman* at the film director's studio. But whether it was guilt or concern, I knew I should be at Ed's funeral at 2:00 p.m.

'The highway provided me with nothing but a blanket of mist and melancholy. Slashing past 110-th and Compton Ave. I caught sight of Greater Antioch Baptist Church just as four of my students were carrying Ed's body into the dismal looking building.

'Water dripped from the ceiling as the small choir intoned, *Come Sweet Jesus* . . . Only the appearance

of plump Rev. Black, Bible in hand, saved us from their uncoordinated efforts.

'I couldn't catch what Black was reading but it was unimportant. I was here, somber, moody, thoughtful; and all to the testimony that I as a white man did care for a young black hipe who died too young . . . too soon.

'Lloyd made it . . . Larry, Fred, Bernard, Fuzzy—they were all there. Seemed like every addict in the community was on the scene with his leather jacket and shades, as if to collect . . . or to pay off to Ed. What a lineup! Sargent (sic) Masterson from Precinct 77 would have raised a brow or two at this gathering.

'Kelly had tears streaming down his face; perpetually high . . . who could blame him; deserted father, bitch mother; in and out of jail since thirteen. He shot with Ed for the last time that Saturday night.

'The wailing, so characteristic at a Black funeral did not begin until the second stanza of, *I Believe,* delivered by Hessie Jones. The little Black kid next to me stared at the solitary tear that rolled down my cheek.

'Why are women so goddam (sic) hysterical? Did they really know Ed? Did they care? Were they using Ed's "time" from their own shackels of welfare and project living? I do not know. I do not live in Watts;

but I feel for them now, in their strange melodramatic way.

'Only the obituary read by Sister Maebelle shooke me out of my depression. "Ed Leavy Pollard, Born in Greenwood, Miss., 1952; Died Jan. 11, 1969 . . ." She droned on in a pitifully low, uneducated tone.

'Curley, a steady shooter with Ed was moved to bellow out, "Louder Lady, I can't hear ya." Choresetta in the fourth pew from the front responded to this abrupt remark with a deep shaking sob. The storm grew louder. I noticed at least three leaks from the roof now. God, what a depressing hole; wet, dam (sic), pictureless, peeling paint, worn, dam (sic) pews; only the cossack of Ed and us. "Only us O Lord," I thought "but what the hell are we here for?"

'I sit here white, middleclass, secure, while the goddam (sic) system rapes these poor people of every vestage [*sic*] of dignity.

'Rev. Galine, a slick looking "Tom" began the eulogy; Jeremiah was the scapegoat. First there was the woman in the back row. She was joined by three others; then another . . . and another; soon everyone in the drama had his chance to chant a response back to the Baptist Preacher; "Oh Lord" . . . "That's right" . . . "Im listnin" . . . "Speak God" . . . Only periodic gasping sighs (sobs) interrupted the Rev's show.

'Ed would have rolled over and grimaced if he would have heard the hysterics when David, his class-

mate, opened his cossack for the finale. The weeping and gnashing lasted long enough for all of us to troop past Ed and glance at his ashen, black face.

'I felt whipped out; this was a strange two hours; strange to a white who had no blackness in him; strange to a white who knew no such poverty and desperation; even stranger outside when I greeted a young Black in a Panther-like outfit: "White-mother-fuckin Pig" ...'"

The second charge pertinent on this appeal was set forth in the hearing officer's proposed decision as follows: "F. On approximately February 6, 1970 at the close of a class session the students in the class then being instructed by respondent departed from the room with few exceptions and without being dismissed by respondent and prior to the sounding of the bell signalling the close of the class session. It was established that on this date respondent had instructed those of his students who were in possession of a book entitled 'Zorba the Greek' to depart from class early, secure the book from their lockers, and return the book to the library so that it could be redistributed on the morning of February 19th when it was needed by the students of another English instructor. It was not established that all of those students who departed were leaving to complete this errand. It is contrary to school policy to permit students to be out of class during the class time without a proper pass, with the limited exception that five students at a time may be permitted

to be in the hallway for the purpose of obtaining or returning books at the bookroom in the library."

A further portion of the hearing officer's proposed decision was as follows: "E. It is a policy at South High School that all instructional material used by the teachers at the high school be approved prior to its use. It is, however, the established practice at the school that various instructors are permitted to make use of instructional material brought to the school from outside sources and which has not been approved. This practice is known to and tolerated by the administration of the school."

The hearing officer also stated as established facts that the school "has in its school library various books and current publications which are shelved in the open shelving area and available to all students, which contain words which are either the same as or closely similar to the words which appear in the two writings ["The Funeral" and another writing not involved in this appeal] . . ." and that the school "has also permitted instructors to take students from the high school, as part of the school curriculum, to the presentation of stage plays in which the lines spoken by the actors contained the same or similar words."

Pursuant to his findings of fact, the hearing officer made "determination of issues." As to the charge relating to permitting students to be out of class during the class time without a proper pass, he determined that, as established, it did constitute a violation of

school policy which related to the welfare of the school and the students thereof and, therefore, did constitute "cause within the meaning of Section 13443, Education Code."

With rsepect to the reading in classes by Mr. Lindros of his story "The Funeral," the hearing officer stated that final determination of the issue involved required "a resolution of the question of the accepted standards relating to the use of outside material by teachers." The hearing officer further stated: "Although there is an articulated policy that all classroom material be approved in some manner prior to its use in the classroom, there has been a widespread use of outside instructional material selected by the instructors and not submitted for approval. This practice is so commonly accepted that it has become the actual policy of the school. [¶] The school does sanction the use of literary works and current periodical material in which socially unacceptable words and phrases appear. There has been no clear statement of the criteria or standard applied in selecting this material but a fair review of the practices followed would support the understanding that writings appearing in accepted literary works and appearing in generally accepted periodicals such as the metropolitan daily newspapers and well known national magazines are appropriate for classroom use. . . . [¶] Respondent's original story "The Funeral" is not within the generally accepted standard and its use would violate the policy of the school in regard

to the introduction of objectionable language into the classroom. It is not a generally accepted literary work and does not appear within a generally accepted periodical. Respondent's lapse of judgment and violation of standards is a factor relating to the welfare of the students and the school. [¶] In considering the seriousness of the use of the offending material, some mention should be made of the fact that these words were presented either fully or by their initial letters to five classes of a total of approximately 150 students. No complaint arose from the students and none arose from the parents of these students. This will not establish that the mateiral was appropriate for classroom use but does tend to establish that the context and manner of presentation was not nearly so startling to the students who heard it in its classroom use as the disembodied restatement of the offending words makes it appear. [¶] Another relevant consideration is the problem of judgment and professionalism. It should require no argument to support the proposition that the District's Governing Board, as the ultimate employer of the teacher on behalf of the citizens of the District, has the right to control the teacher by promulgating the standards of conduct which it deems appropriate. These standard[s] may allow broad discretion or may be explicit. Here, as is true of much in the field of education, a latitude has been allowed for the exercise of the professional judgment of the educational administrators and the teachers. Whenever latitude for judgment is granted there will be inevit-

ible [*sic*] variances in its exercise by the individuals involved. The superior may reasonably anticipate that the subordinate's exercise of judgment will vary from his own and, particularly in the case of a beginning employee, that it will be at times erronious [*sic*]. In such instances the employer must finally decide whether the mistaken judgment is such that the employee should be corrected or whether it is so erronious [*sic*] that the employee must be dismissed."

The governing board of the school district adopted the proposed decision of the hearing officer as its decision in the matter. In the governing board's decision it was further stated: "Sufficient cause exists pursuant to Section 13443 of the Education Code not to reemploy respondent for the 1970-71 school year in that each of the charges found by the hearing officer to be sustained by the evidence and related to the welfare of the schools and the pupils thereof . . . are hereby determined as separately and collectively constituting such sufficient cause not to reemploy respondent for the ensuing 1970-71 school year."

In the mandamus proceeding the superior court found that, with respect to the charge involving the reading of the story entitled "The Funeral," there was substantial evidence to support the hearing officer's findings of fact. As to the story entitled "The Funeral," a portion of the court's findings of fact were: "On or about October 17, 1969, Petitioner read to five of his classes of Tenth Grade students a short story of

his own composition entitled 'The Funeral.' When the Petitioner read this story out loud to some of these classes, he did not omit the expression, 'white motherfucking pig,' which language is manifestly coarse and vulgar. Petitioner should have know that such language by a teacher was totally unacceptable in a Tenth Grade English class. [¶] A teacher in a public school district is regarded by the public and pupils in the light of an exemplar whose words and actions are likely to be followed by the children coming under his care and protection. The use of the coarse and vulgar expression by the Petitioner was the exercise of extreme bad judgment."

A portion of the conclusions of law of the superior court was that the paragraphs of the hearing officer's findings of fact specifically relating to the two charges involved on this appeal were supported by substantial evidence and that the charges so established "were found to be related to the welfare of the school and the pupils thereof, and the Governing Board's determination of sufficiency is conclusive."

The basic contention presented by the plaintiff is that the refusal to rehire him because of his reading of "The Funeral" to his tenth grade English classes constituted a violation of academic freedom protected by the First Amendment of the United States Constitution. Reliance is placed upon the reasoning of Parducci v. Rutland (D.C.M.D.Ala., N.D.1970) 316 F. Supp. 352 and Keefe v. Geanakos (1st Cir. 1969) 418

F.2d 359. It is argued as follows: "Particular attention should be paid to the facts that 'The Funeral' could not be deemed obscene, the slang words are common, the words have a definite literary purpose in the story (e.g., ironic differences in outlook), no students, nor even their parents, complained, works with similar words could be found elsewhere in the school, students were required to attend plays with similar words and there was no showing of material disruption in the class. [¶] To allow a teacher not to be rehired for such teaching would chill free speech and stifle creative innovation."

[1] It is manifest that the applicability of the concept of academic freedom must be determined in the light of the circumstances of the particular case. Academic freedom does not signify the absence of all restraint. Apropos is the following statement of the court in Mailloux v. Kiley (1st Cir. 1971) 436 F.2d 565, at page 566: "The court in no way regrets its decision in Keefe v. Geanakos, 1 Cir., 1969, 418 F.2d 359, but it did not intend thereby to do away with what, to use an old-fashioned term, are considered the proprieties, or to give carte blanche in the name of academic freedom to conduct which can reasonably be deemed both offensive and unnecessary to the accomplishment of educational objectives. [Citation.] Here, particularly, such questions are matters of degree involving judgment on such factors as the age and sophistication of students, relevance of the educational purpose, and

context and manner of presentation." The court further stated at the page cited: "Finally, we say that the court does not intend to referee every debatable dispute between school teachers and their employers simply because academic fredom may arguably be involved. We will not superimpose our judgment on the school authorities unless, in a constitutional area, we consider their decision plainly wrong."

As aptly stated by Judge Wyzanski in Mailloux v. Kiley (D.C.D.Mass., 1971) 323 F.Supp. 1387, at page 1392: "The secondary school more clearly than the college or university acts in *loco parentis* with respect to minors. It is closely governed by a school board selected by a local community. The faculty does not have the independent traditions, the broad discretion as to teaching methods, nor usually the intellectual qualifications, of university professors. Among secondary school teachers there are often many persons with little experience. Some teachers and most students have limited intellectual and emotional maturity. Most parents, students, school boards, and members of the community usually expect the secondary school to concentrate on transmitting basic information, teaching 'the best that is known and thought in the world,' training by established techniques, and, to some extent at least, indoctrinating in the *mores* of the surrounding society. While secondary schools are not rigid disciplinary institutions, neither are they open forums in which mature adults, already habituated to social restraints, ex-

change ideas on a level of parity. Moreover, it cannot be accepted as a premise that the student is voluntarily in the classroom and willing to be exposed to a teaching method which, though reasonable, is not approved by the school authorities or by the weight of professional opinion. A secondary school student, unlike most college students, is usually required to attend school classes, and may have no choice as to his teacher."

In Keefe v. Geanakos, *supra,* 418 F.2d 359, the action had been brought by a tenured high school teacher to enjoin the school committee from voting on the matter of the teacher's discharge. The teacher had given each member of his senior English class a copy of the September, 1969, "educational number" of the Atlantic Monthly, 75 copies of which had been supplied by the school department. The reading assignment was the first article in the magazine. The teacher discussed the article and a particular word used therein, explaining the word's origin and context and the reasons the author had included it. The word, admittedly highly offensive, was a vulgar term for an incestuous son. The teacher stated that any student who felt the assignment to be personally distasteful could have an alternative assignment. After reading the article, which had been described as a valuable discussion of "dissent, protest, radicalism and revolt," the court concluded that it was "in no sense pornographic," but was "scholarly, thoughtful and thought provoking" and that the particular word was not "arti-

ficially introduced," but, on the contrary, was "important to the development of the thesis and the conclusions of the author." The court further stated that it would be "difficult to disagree with plaintiff's assertion that no proper study of the article could avoid consideration of this word" and that if "it raised the concept of incest, it was not to suggest it, but to condemn it," the word being used, by the persons described, "as a superlative of approbrium." (418 F.2d at page 361.) Thereafter the court noted (page 362): "Furthermore, as in all other instances, the offensiveness of language and the particular propriety or impropriety is dependent on the circumstances of the utterance." In *Keefe* the discussion of the word was directly related to the serious consideration of a subject which could reasonably be found to be proper in the case of students who had reached the maturity of high school seniors.

[2, 3] *Keefe* is distinguishable from the case presently before this court. In *Keefe* the students were in the twelfth grade and, as has been noted, the use of vulgar language could reasonably be said to be justified in that it served a legitimate professional purpose. In the case presently before this court the students were in the tenth grade and were assigned the task of preparing a short story in which the writer related a personal emotional experience. In response to requests of students the plaintiff read to his classes "The Funeral" as an example of his own work embodying such

an experience. But it was not unreasonable to conclude that the embodiment of vulgarity in a model of a story of the genre which the teacher sought to have his students write substantially transcended any legitimate professional purpose and was without the pale of academic freedom. Manifestly, such conduct related to the welfare of the school and the pupils thereof. Section 13443 of the Education Code placed in the governing board the duty of determining the sufficiency of such conduct as cause for declining to rehire the probationary teacher. Since the determination of the board had a reasonable and substantial basis in the record, not involving a violation of academic freedom under the First Amendment, a reviewing court is not free to interfere therewith (see Bekiaris v. Board of Education, 6 Cal.3d 575, 589, 100 Cal.Rptr. 16, 493 P.2d 480), unless there is merit in the contentions remaining for consideration.

The plaintiff contends that his reading of "The Funeral" could not be a basis for refusing to rehire him because he was not given adequate notice that conduct of that nature would subject him to disciplinary action. In support of his position the plaintiff makes reference to portions of the hearing officer's proposed decision, which have been noted hereinabove, as to the use of instructional material obtained from other than school sources, the presence of periodicals and books in the school library containing words falling within the classification of vulgarity, and the attend-

ance of pupils at plays in which similar language was used.

[4, 5] There is no iron-clad rule of law that regulations or rules be promulgated which specify in minute detail the various kinds of misconduct which will subject a teacher to disciplinary action. It is not unreasonable to assume that a person engaged in the profession of teaching will have a reasonable concept of generally accepted standards relating to propriety of conduct, including the avoidance of vulgarity, and will adhere to such standards in his relationship with his pupils. This does not mean, of course, that when relevant to the serious pursuit of a proper academic subject or inquiry words may not be used which under other circumstances should be avoided as inappropriate. As stated in *Keefe* (418 F.2d at page 362): "Furthermore, as in all other instances, the offensiveness of language and the particular propriety or impropriety is dependent on the circumstances of the utterance." Moreover, at the page cited, it was also stated: "It does not follow that a teacher may not be on notice of impropriety from the circumstances of a case without the necessity of a regulation." The same court subsequently stated in Mailloux v. Kiley, *supra,* 436 F.2d 565, at page 566: "We do suggest that the fact that there was no regulation proscribing the use of particular language does not alone compel a conclusion that due process was violated."

[6] Adhering to an objective standard, in the pres-

ent case it was not unreasonable to determine that the plaintiff was on notice that in teaching his tenth grade English classes the art of writing a short story and in affording his students aid by using as a model a short story written by him, resort to a particular story embodying vulgarity would not serve a substantial educational purpose but would constitute a serious impropriety because of the extraneous matter of an unexemplary nature. Since manifestly inherent in such conduct was the probability of an effect adverse to the welfare of students, it was reasonable to assume that the teacher was aware that he was thereby subjecting himself to the hazard of disciplinary measures. Consequently, his contention as to the lack of adequate notice to satisfy the concept of due process is untenable.

The plaintiff contends that the board's decision is void because the members thereof determined that there was sufficient cause not to rehire the plaintiff without reading the transcript of the proceedings before the hearing officer. Section 13443 of the Education Code provides in part as follows: "(*c*) In the event a hearing is requested by the employee, the proceedings shall be conducted and a decision made in accordance with Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code and the governing board shall have all the power granted to an agency therein, except that: . . . (3) the hearing shall be conducted by a hearing officer who shall prepare a proposed decision, containing find-

ings of fact and a determination as to whether the charges sustained by the evidence are related to the welfare of the schools and the pupils thereof, but the proposed decision shall not contain a determination as to the sufficiency of the cause or a recommendation as to disposition, which sufficiency and disposition shall be determined by the governing board. . . . [¶] (*d*) The governing board's determination not to reemploy a probationary employee for the ensuing school year shall be for cause only. The determination of the governing board as to the sufficiency of the cause pursuant to this section shall be conclusive, but the cause shall relate solely to the welfare of the schools and the pupils thereof . . ."

The chapter of the Government Code to which reference is made in section 13443 of the Education Code is entitled "Administrative Adjudication." The plaintiff's argument that in the present case the board's decision was invalid because its members did not read the transcript of the proceeding conducted by the hearing officer arises from the fact that section 13443 of the Education Code provides that the proposed decision of the hearing officer "shall not contain a determination as to the sufficiency of the cause or a recomendation as to disposition." Reliance is placed on the *Morgan* cases—Morgan v. United States, 298 U.S. 468, 56 S.Ct. 906, 80 L.Ed. 1288 and 304 U.S. 1, 58 S.Ct. 999, 82 L.Ed. 1129. (See Hohreiter v. Garrison, 81 Cal. App.2d 384, 393-401, 184 P.2d 323.) In essence the ar-

gument made is that the members of the governing board were required to read the transcript of the proceedings before the hearing officer because that officer was not empowered to recommend an ultimate disposition and did not do so.

A portion of the argument is as follows: "Thus, in circumstances in which the matter is to be heard by a hearing officer alone, the determination of whether a probationary teacher is to be rehired for the ensuing year is a bifurcated matter. The hearing officer must determine the facts and must decide if they constitute cause related to the welfare of the schools and the pupils. He may make no finding with respect to the sufficiency of these causes not to rehire the probationary teacher. This determination rests, *ab initio,* with the governing board. . . . Appellant contends that because of this bifurcation, the governing board may not follow the procedure outlined in Government Code § 11517(b).[2] . . . The Government Code § 11517(b) proposed decision must be in a form that may be adopted as the 'decision in the case'; and a 'decision in the case' must include a recommended disposition. . . . If there were no recommendation as to disposition in the proposed decision, there would be no way to reduce the penalty. . . . Therefore, the governing board must proceed pursuant to Government Code § 11517

[2]Section 11517, subdivision (b), of the Government Code is in pertinent part as follows: "If a contested case is heard by a hearing officer alone, he shall prepare a proposed decision in such form that it may be adopted as the decision in the case. . . . The agency itself may adopt the proposed decision in its entirety, or may reduce the proposed penalty and adopt the balance of the proposed decision."

(c),[3] and its members must read the administrative transcript before rendering its own decision. To do otherwise would mean that the decision maker had merely 'dipped' into the proceedings. See, Morgan v. United States, 304 U.S. 1, 58 S.Ct. 999, 82 L.Ed. 1129 (1937)."

In support of his position the plaintiff discusses that portion of the hearing officer's proposed decision which was a finding of fact as to one accusation and was expressed as follows: "G. On October 2, 1969, respondent left his classroom at a time when a class was in session. It is contrary to school policy, except in the case of extreme emergency, for a teacher to leave a classroom at a time when students will be unsupervised. It was not established that any supervision was being afforded the students during the respondent's absence." It is true that the trial court, after reading the transcript of the proceedings before the hearing officer, found as follows: "There is no substantial evidence to support the findings in Paragraph VII G involving Petitioner [plaintiff] leaving his classroom unsupervised." But, aside from the issue of the existence of substantial evidence, it is manifest that as to that accusation the hearing officer failed in his duty to make plenary findings of fact of such a nature that the board could reasonably and intelli-

[3]Section 11517, subdivision (c), of the Government Code is in pertinent part as follows: "If the proposed decision is not adopted as provided in subdivision (b), the agency itself may decide the case upon the record, including the transcript, with or without taking additional evidence, . . ."

gently determine therefrom whether the facts as established by the evidence presented to the hearing officer constituted the requisite cause for declining to rehire the probationary teacher for the ensuing school year.

In contrast, the findings of fact as to the plaintiff's reading of "The Funeral" to his tenth grade classes were plenary in nature and furnished to the board a proper and adequate basis upon which to exercise reasonable judgment as to whether the established facts constituted cause for not rehiring the probationary teacher. Indeed, the facts as to the conduct of the plaintiff in this instance do not appear to be in substantial dispute.

[7] Guidance leading to the conclusion that there is no violation of due process in assigning to the hearing officer the duty of hearing the evidence and making plenary findings of fact as to an accusation and in assigning to the governing board the duty of exercising judgment as to whether such facts as so established constitute cause for not rehiring a probationary teacher is found in the reasoning of Bertch v. Social Welfare Dept., 45 Cal.2d 524, 289 P.2d 485. In *Bertch* the basic question was whether or not the petitioners were "needy" persons within the provisions of the Old Age Security Act. Each petitioner, upon denial of aid, filed an appeal with the Social Welfare Board. The board appointed a referee to hear the appeals. A hearing was had at which petitioners were

represented by counsel. The referee submitted his findings to the board; the board denied the appeals. The petitioners then filed a petition for a writ of mandate in the superior court, seeking a review of the matter both as to the law and the facts.

On appeal in *Bertch* the Supreme Court noted (45 Cal.2d at page 527, 289 P.2d 485) that the petitioners had pointed to no specific finding of fact of the hearing officer which was changed by the board. The petitioners contended that the procedure outlined in section 11517, subdivisions (b) and (c), of the Government Code should have been followed. It was the board's position that the procedure set forth in sections 104.1, 104.2, 104.3 and 104.5 of the Welfare and Institutions Code constituted the proper method.

The Supreme Court stated (45 Cal.2d at page 527, 289 P.2d at page 487): "Preliminarily, it should be noted that section 11501 of the Government Code provides: '*Extent to which procedure conducted pursuant to chapter: Agencies included.* (a) The procedure of any agency shall be conducted pursuant to the provisions of this chapter *only as to those functions to which this chapter is made applicable by the statutes relating to the particular agency.*' (Emphasis in body of statute added.) . . . It is our opinion that the board's contention that the section means it is to apply only when made applicable by the statutes relating to the particular agency involved is meritorious. . . . It appears then that the board is correct in its contention that

sections 104.1 et seq. of the Welfare and Institutions Code contain the controlling procedure."

Section 104.5, subdivision (c), of the Welfare and Institutions Code provided as follows: "If an appeal, hearing or rehearing is not heard by the board, a report of the proceedings shall be prepared by the referee conducting it and the report, together with any data the party appealing may desire, shall be presented to the board for final decision. Only the board may make such final decision." The Supreme Court stated (45 Cal.2d at page 529, 289 P.2d at page 488): "It would appear that under the situation here present where petitioners were given a full opportunity to be heard before the hearing officer whose report was then reviewed by the board, there was no denial of procedural due process of law."

[8] The plaintiff contends that the board violated the Brown Act (Gov.Code, §§ 54950-54960). The plaintiff had requested in writing that the hearing before the board be held in an open session. (See Gov.Code, § 54957.) The meeting of the board was held on June 5, 1970, at which time arguments were presented. The board then went into executive session during which the board considered the arguments, the findings of the hearing officer, and the objections presented on behalf of Mr. Lindros.[4] Thereafter the board reconvened in

[4]Petitioner cites Sacramento Newspaper Guild etc. v. Sacramento County Bd. of Suprs., 263 Cal.App.2d 41, 69 Cal.Rptr. 480. Therein the court stated at pages 47-48, 69 Cal.Rptr. at p. 485: "There is nothing in the Brown Act to demarcate a narrower application than the range of governmental functions performed by the agency. . . . Section 54950 is a deliberate and palpable ex-

public session; in that open session the board by vote adopted the findings of the hearing officer and determined that there was sufficient cause not to re-employ Mr. Lindros.

The findings of fact of the superior court were in part as follows: "No evidence or formal arguments were heard, or formal action was taken by the Governing Board of Respondent District while in executive session considering this matter. Petitioner, on or about May 12, 1970, demanded, by registered mail, that the hearing of Respondent be held in open session. At the hearing on June 5, 1970, Respondent went in to executive session over Petitioner's objections. After returning from executive session, Respondent members formally voted to adopt the proposed decision of the hearing officer; the members also formally voted that there was sufficient cause not to re-employ Petitioner."

The court's conclusion of law with respect to the matter was as follows: "There was no violation of the Brown Act, and if the alleged violation occurred, it was but a technical violation which would not invalidate the action subsequently taken by the Governing Board."

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pression of the act's intended impact. It declares the law's intent that deliberation as well as action occur openly and publicly. Recognition of deliberation and action as dual components of the collective decision-making process brings awareness that the meeting concept cannot be split off and confined to one component only, but rather comprehends both and either. To 'deliberate' is to examine, weigh and reflect upon the reasons for or against the choice. . . . Deliberation thus connotes not only collective discussion, but the collective acquisition and exchange of facts preliminary to the ultimate decision."

The formal action of the board affecting the status of the plaintiff occured in open session. It is not reasonable to conclude that because of the executive session there was a violation of due process or that otherwise the plaintiff's rights were prejudiced or that he was subjected to a miscarriage of justice. Guidance is found in the reasoning of the court in *Huntington Beach Union High School Dist. v. Collins,* 202 Ca.App. 2d 677, at page 682, 21 Cal.Rptr. 56, at page 59: "The record does not show that the board took any action toward appellant's dismissal or heard any additional evidence pertaining thereto at the executive session. The only decision reached during the executive session was to allow appellant another opportunity to answer the question which he had failed to answer at the first meeting. Then, during the second public hearing, appellant again refused to answer the questions. After this second refusal, the board approved a motion stating that appellant's answers were evasive and that he should be suspended. If there was a technical violation of the Brown Act (Govt.Code, secs. 54950-54960), it in no way prejudiced appellant's rights and did not invalidate the action of the board."

[9] The plaintiff asserts that the charges of unauthorized departure of students from his class "was just a make-weight" and. consequently, if the accusation based on his reading of "The Funeral" to his classes is found to be an insufficient basis for refusing to rehire him, the governing board's decision

should be set aside. But, for the reasons hereinabove set forth, the accusation with respect to "The Funeral" was supported by substantial evidence which justified the board's decision. The plaintiff also states that his further contention as to the unauthorized departure accusation "does not rest on the inadequacy of the evidence"; he asserts that there was a failure to follow "the proper procedural method of making the determination and the proper allocation of proof burden." But no purpose would be served by a plenary discussion of the plaintiff's argument with respect to the accusation as to the unauthorized departure of students from the plaintiff's classroom since it was stated in the board's decision that the charges found by the hearing officer to be sustained by the evidence were determined by the board to be "separately and collectively" sufficient cause for not rehiring Mr. Lindros. By that determination the board made manifest its conclusion that each of the charges found by the hearing officer to be sustained by the evidence, considered by itself, constituted sufficient cause not to reemploy the plaintiff for the ensuing school year. Consequently, the plaintiff's conduct in reading "The Funeral" to his classes, standing alone and apart from any other accusation, was sufficient to sustain the board's decision not to rehire Mr. Lindros. (See *Mast v. State Board of Optomery*, 139 Cal.App.2d 78,

92-93, 293 P.2d 148; *Genser v. State Personel Board*, 112 Cal.App.2d 77, 88-89, 245 P.2d 1090, 1097.)[5]

The judgment is affirmed.

SCHWEITZER, and ALLPORT, JJ. c,oncur.

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[5]In *Genser* at the pages cited, the court stated: "The decision of the Personnel Board was as follows: [¶] 'That for the acts as found to be true as set forth hereinabove, and for each of said acts separately and severally, the respondent is hereby suspended from the date of his suspension to March 1, 1949, and from his position as Motor Vehicle Investigator, Grade Two, of the Department of Motor Vehicles of the State of California.' [¶] It is clear that the Board intended to exact the penalty imposed on each count of the charges, and in view of the fact that we have reached the conclusion that the findings as to the first two charges are supported by substantial evidence, it is unnecessary to discuss at any length the remaining charges and findings."

APPENDIX "D"

ORDER DENYING REHEARING[1]

Supreme Court, San Francisco, July 12, 1973

L A 30059 — Lindros v. Governing Board of the Torrance Unified School District. [9 C.3d 524.]

Respondent's petition for rehearing denied. McComb, J., Burke, J., and Clark, J. are of the opinion that the petition should be granted.

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[1]California Official Reports, Official Advance Sheets of the Supreme Court, Courts of Appeal, and Appellate Departments of The Superior Court, July 26, 1973, Minutes (green sheets), pp. 1, 5. (Bancroft -Whitney Company, 1973)

APPENDIX "E"

CALIFORNIA EDUCATION CODE SECTION 13443[1]

(a) No later than March 15 and before an employee is given notice by the governing board that his services will not be required for the ensuing year, the governing board and the employee shall be given written notice by the superintendent of the district or his designee, or in the case of a district which has no superintendent by the clerk or secretary of the governing board, that it has been recommended that such notice be given to the employee, and stating the reasons therefor.

If a probationary employee as been in the employ of the district for less than 45 days on March 15, the giving of such notice may be deferred until the 45th day of employment and all time periods and deadline dates herein prescribed shall be coextensively extended.

Until the employee has requested a hearing as provided in subdivision (b) or has waived his right to a hearing, the notice and the reasons therefore shall be confidential and shall not be divulged by any person,

[1]Deering's California Codes Annotated, Education; Added by California Statutes, 1965, c.1110, §2, p.2755; Amended by Cal.Stats., 1969, c.1315, p. 2651, sec.1; Cal.Stats., 1970, c.273, p.543, sec.1; Cal.Stats., 1970, c.1565, p. 3203, sec.2; Cal.Stats., 1971, c.655, p.1301, sec.1; Cal.Stats., 1971, c.659, p. 1310, sec.2.

except as may be necessary in the performnce of duties; however, the violation of this requirement of confidentiality, in and of itself, shall not in any manner be construed as affecting the validity of any hearing conducted pursuant to this section.

(b) The employee may request a hearing to determine if there is cause for not reemploying him for the ensuing year. A request for a hearing must be in writing and must be delivered to the person who sent the notice pursuant to subdivision (a), on or before a date specified therein, which shall not be less than seven days after the date on which the notice is served upon the employee. If an employee fails to request a hearing on or before the date specified, his failure to do so shall constitute his waiver of his right to a hearing. The notice provided for in subdivision (a) shall advise the employee of the provisions of this subdivision.

(c) In the event a hearing is requested by the employee, the proceeding shall be conducted and a decision made in accordance with Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code and the governing board shall have all the power granted to an agency therein, except that:(1) the repsondent shall file his notice of defense, if any, within five days after service upon him of the accusation and he shall be no-

tified of such five-day period for filing in the accusation; (2) the discovery authorized by Section 11507.6 of the Government Code shall be available only if request is made therefor within 15 days after service of the accusation, and the notice required by Section 11505 of the Government Code shall so indicate; and (3) the hearing shall be conducted by a finding officer who shall prepare a proposed decision, containing findings of fact and a determination as to whether the charges sustained by the evidence are related to the welfare of the schools and the pupils thereof, but the proposed decision shall not contain a determination as to the sufficiency of the cause or a recommendation as to disposition, which sufficiency and disposition shall be determined by the governing board. The proposed decision shall be submitted to the governing board on or before May 7 of the year in which the proceeding is commenced. All expenses of the hearing, including the cost of the hearing officer, shall be paid by the governing board from the district funds. The board may adopt from time to time such rules and procedures not inconsistent with provisions of this section, as may be necessary to effectuate this section.

(d) The governing board's determination not to reemploy a probationary employee for the ensuing school year shall be for cause only. The

determination of the governing board as to the sufficiency of the cause pursuant to this section shall be conclusive, but the cause shall relate solely to the welfare of the schools and the pupils thereof and provided that cause shall include termination of services for the reasons specified in Section 13447. The decision made after the hearing shall be effective on May 15 of the year the proceeding is commenced.

(e) Notice to the probationary employee by the governing board that his service will not be required for the ensuing year, shall be given no later than May 15.

(f) If a governing board notifies a probationary employee that his services will not be required for the ensuing year, the board shall, within 10 days after delivery to it of the employee's written request, provide him with a statement of its reasons for not reemploying him for the ensuing school year.

(g) Any notice or request shall be deemed sufficient when it is delivered in person to the employee to whom it is directed, or when it is deposited in the United States registered mail, postage prepaid and addressed to the last known address of the employee.

(h) In the event that the governing board does not give notice provided for in subdivision (e) of

this section on or before May 15, the employee shall be deemed reemployed for the ensuing school year.

(i) If after request for hearing pursuant to subdivision (b) any continuance is granted pursuant to Government Code Section 11524, the dates prescribed in subdivision (c), (d), (e) and (h) which occur on or after the date of granting the continuance shall be extended for a period of time equal to such continuance.